In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
FRITZ AUGUSTUS HEINZE. } No. 671.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
FRITZ AUGUSTUS HEINZE. } No. 380.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

I.

STATEMENT OF CASE NO. 671.

The indictment in case No. 671, which has been advanced to be heard with case No. 380, consists of fourteen counts, and are numbered 1, 1A, 2, 2B, etc. The material part of the first count reads as follows:

> That he, said Fritz Augustus Heinze, so being president of said banking association as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze as president of said banking association, on said twenty-first day of June, in the year nineteen hundred and seven, then and there, at said city

of New York and county of New York and district aforesaid, unlawfully, knowingly, and fraudulently, and with intent to injure and defraud said banking association and divers other persons to the grand jurors unknown, did willfully misapply certain of the moneys, funds, and credits of said banking association, then and there being to the amount and of the value of sixty thousand dollars ($60,000), by unlawfully, knowingly, fraudulently, and willfully, and not for any use, benefit, or advantage of the said banking association, converting and applying the said moneys, funds, and credits to the use, benefit, and advantage of certain persons then and there doing business under the firm name and style of Otto Heinze & Co., to wit, Otto C. Heinze, Arthur P. Heinze, and Max H. Schultze, which said conversion and application of the said moneys, funds, and credits was then and there accomplished by said Fritz Augustus Heinze in the manner following, that is to say: By virtue of the power of management, control, and direction which the said Fritz Augustus Heinze as president of the said banking association then and there possessed over the moneys, funds, and credits of the same, the said Fritz Augustus Heinze, at the time and place aforesaid, with the intent aforesaid, and to the use as aforesaid, unlawfully, knowingly, and fraudulently did then and there willfully apply the said sum of sixty thousand dollars ($60,000) of the moneys, funds, and credits of said banking association to the making of a certain demand loan for the said amount to said

> Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, partners, doing business under the firm name of Otto Heinze & Co., as aforesaid, and which said loan, when so made as aforesaid, was not then and there well secured, which fact he, the said Fritz Augustus Heinze, then and there well knew; and thereupon, to wit, at the time and place in this count of this indictment first aforesaid, the said Fritz Augustus Heinze did cause the proceeds of said loan, amounting to the said sum of sixty thousand dollars ($60,000), to be paid out of the moneys, funds, and credits of said banking association and applied and converted to the use and benefit of the said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, whereby the said sum of sixty thousand dollars ($60,000) then and there was wholly lost to the said banking association, and the moneys, funds, and credits of the same were and are depleted in that amount, against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided. (Rec., p. 3.)

Count 1A relates to the same transaction, and the manner of the conversion or misapplication as described is the same, except it is there alleged that the misapplication was for the benefit of Fritz Augustus Heinze and Otto Heinze & Co., a firm composed of Otto C. Heinze, Arthur P. Heinze, and Max H. Schultze; while in the first count it is alleged that the misapplication was alone for the benefit of Otto Heinze & Co. And, furthermore, the charge of misapplication and the descrip-

tion of the manner in which it was made, was prefaced by a lengthy statement wherein the character of a corporation known as the United Copper Company was fully described, together with the relationship existing between the defendant and Otto Heinze & Co. and said corporation, and a history of certain dealings upon the part of the defendant and said Otto Heinze & Co., whereby it was intended that, by certain manipulations, the stock of said corporation should be largely inflated in value; and it was alleged that the resources of the Mercantile National Bank were used, and the misapplication in question was made, in carrying out this scheme, it being known at the time that the stock was not of great instrinsic value, and that, under the circumstances, the investment of the bank's funds for the purpose of promoting the scheme described was attended with very great risk.

Each of the subsequent numbered counts contains the same allegations as count 1, except they relate to different transactions, and in addition to the allegation that the note upon which the loan was made "was not then and there well secured" was added "and in fact was not secured at all," and the lettered counts are the same as count 1A, with like exceptions, and each numbered count and the lettered count bearing the same number relate to the same transaction.

On March 9, 1910, a demurrer was filed to the several counts of the indictment (Rec., pp. 24, 25), which

demurrer was, on March 21, 1910, overruled "without prejudice, however, to the defendant to raise and present at any trial under the indictment herein the questions of law raised by said demurrer." (Rec., p. 23.) Subsequently defendant appears to have moved the court to quash the indictment, although no formal motion is in the record; and in passing upon this motion the court held, first, that there was no substantial difference between the allegations of the numbered counts of this indictment and those of the first fifteen counts of the indictment of 1909 (case No. 380), and that therefore they did not set forth such facts as showed a conversion within the meaning of section 5209, Revised Statutes, under which the indictment was drawn, and, second, understanding that each numbered and corresponding lettered count were based upon the same transaction, and that the numbered count "sets forth a very general form of words under which it is hoped that other proof may be admitted to help out the allegations if the indictment of the exact case made" by the lettered count fails, and, believing that it is not wise for the advantage of the administration of criminal law that evidence should be speculated with in that manner, he exercised the discretion which he thought he possessed and quashed the numbered counts (Rec., pp. 25–27), the order reciting that these counts were quashed by the court in the exercise of his discretion and for the reasons stated in the opinion. (Rec., p. 28.)

II.

Relationship between counts in the 1909 indictment (Case No. 380) and the 1910 indictment (Case No. 671), and differences in allegations contained therein.

Counts 2, 3, 4, 5, 6, and 7 in the latter indictment involve the same transactions as those upon which counts 4, 5, 6, 7, 8, and 16 in the former indictment were based; and the difference between the allegations of the numbered counts in the 1910 indictment and the several counts in the 1909 indictment are:

First. In the several counts of the first indictment it is charged that the misapplication was made for the use, benefit, and advantage of the defendant and other persons to the grand jurors unknown (case No. 380, Rec., p. 3), while in the latter indictment it is charged that the misapplication was for the use, benefit, and advantage of those who composed the firm of Otto Heinze & Co., naming them; and it was specifically alleged that the money was loaned to said company.

Second. In the latter indictment the word "conversion" is used with "misapplication," while it does not appear in the first indictment; and

Third. In all the counts of both indictments, except the tenth, eleventh, twelfth, and thirteenth of the first, and the first count of the last, it is alleged that the several notes were "not then and there well secured, and, in fact, not secured at all," while in said remaining counts the phrase "and in fact not secured at all," is omitted.

III.

The act of March 2, 1907, ch. 2564 (34 Stat., 1246), known as the criminal appeals act, is constitutional, and authorized the removal of the cases here under consideration to this court by writ of error.

Counsel for defendant in their brief do not in so many words say that this act is unconstitutional, but that result is inevitable if their insistence is maintained. On page 19 they say:

> We submit it must hence result that the act of March 2, 1907, is inoperative in so far as it seeks to confer upon the United States *alone* a right of review of questions which the defendant may not at any stage of his case bring before this honorable court for final hearing and judgment;

and inasmuch as the statute makes no provision for the removal of a criminal case to this court by a defendant on the grounds mentioned, clearly if an act of this character can not be passed for the benefit of the United States alone, then the present act must be invalid.

The contention is that the act is violative of the fifth amendment of the Constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law, and of the principles of that part of the fourteenth amendment which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws.

Neither of these contentions can be maintained:

1. The act does not tend to deprive an accused of his life, liberty, or property without due process of law.

With the utmost ingenuity, it can not be conceived how the provisions of this act can in the least affect that due process of law by which every person accused of an offense under the statutes of the United States are tried, condemned, and punished if found guilty. Before the passage of this act it was necessary that every person accused of a crime be indicted in a certain way; that he be arrested, arraigned in court, be tried by a jury, have the right to meet the witnesses face to face, and that every formality required by the Constitution be complied with. After the passage of this act every one of these rights still existed. The right of the United States to have this court determine the question whether a court below has properly construed a statute upon which an indictment is based is only *granting to the United States* a new process by which it can challenge the decision of a lower court purely upon a question of law, and *does not deprive the accused* of anything previously possessed by him or guaranteed by the Constitution.

The authorities cited by counsel for defendant, it is respectfully insisted, have no bearing upon the present question. They cite the language of Chief

Justice Waite in the *Sinking Fund Cases* (99 U. S., 700), that:

> The United States can not, any more than a State, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law.

But what the court there had in mind is shown by the language immediately following that quoted, to wit:

> They can not legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands or in the contract for the subsidy bonds without the consent of the corporation. All this is indisputable (p. 719).

No one will deny that what the court here said has always been sound law, but the court was considering a matter of private contract; and held in that case that the act of Congress in question, which provided for the payment of money by the corporations bringing the suit to create a sinking fund, was constitutional, because it did not violate the contract set forth in the charter.

2. That clause of the fourteenth amendment which provides that no State shall have the power to deprive any person within its jurisdiction of the equal protection of the laws has no application to the United States, and if it did, the statute in question would not be violative thereof.

After asserting as a conclusion, from the opinion of Mr. Chief Justice Waite in the *Sinking Fund Cases*, that the prohibition against the United States extends to the three inherent rights, to wit, life, liberty, and property, it is further said in counsel's brief (p. 13):

> It needs no additional argument to further demonstrate that, as the Federal Government is thus equally with the States bound by these prohibitions, the same Federal Government must on original principles be bound also by the further prohibition of the fourteenth amendment, to wit, "nor deny to any person within its jurisdiction the equal protection of the laws."

It is not therein stated what those "original principles" are which make the equal protection clause of the fourteenth amendment applicable to

the United States. This clause, by express language, applies only to the several States, and it has never been insisted that the clause was ever intended to place any restrictions upon the powers of the United States, while the due process clause originally appeared in the fifth amendment, and is there applicable to the United States; and hence, with all due respect to the assertion of able counsel, it is insisted that some additional argument is necessary to demonstrate that the Federal Government is bound thereby.

However, the act in question does not deny to any individual subject to the laws of the United States the equal protection of such laws. Counsel's contention is that, in a criminal prosecution, the United States occupies precisely the same position as the defendant, and that every right and every process that is given to the United States must also be given to the defendant, or otherwise he does not stand before the law on an equality with the United States.

If the basis of this contention, to wit, that the United States and the defendant in a criminal case stand precisely on the same plane, be correct,, and the conclusion drawn therefrom be justified, then it is manifest that the laws regulating criminal procedure heretofore existing in this country have all been unconstitutional; because, if every defendant is entitled to every right and process given the United States, it must be deduced as a corollary that the United States is entitled to every right and process given the defendant; and, consequently, that Congress can not vest the defendant with a

right of appeal, or any other right in criminal procedure, with which it does not at the same time vest the United States; and, moreover, the decisions of this court wherein it has been held that without express congressional enactment the United States can not have a judgment against it in a lower court reviewed by appeal or writ of error, while at the same time it has been recognized that the accused possesses such right, have likewise been in conflict with these "original principles" spoken of by counsel.

The error of counsel's contention may be further demonstrated by applying the same principle to the several States. This equal-protection clause expressly applies to them, but was it ever supposed that it was intended to put the State on an exact equality in criminal procedure with those accused of offenses? If so, it has been woefully misunderstood by all the States, for there is not a State in the Union that does not give the accused many advantages not possessed by the State.

It is a mistaken idea, however, that in criminal law, the United States occupies the attitude to an accused as it does to an opposing party in a civil case involving the enforcement of contractual or other civil rights. Congress has, by enactment, created numerous offenses against the United States, and everyone who violates these acts is prosecuted in the name of the United States, because the offense is against the public, of which the entity known as the United States is the guardian. Consequently, upon the one side of *all* criminal prosecutions stands

the United States, while on the other side stand all those who are accused of offenses created by acts of Congress. Therefore, if it be admitted that every accused is entitled to the *equal* protection of the United States laws, it means that each one accused is entitled to the same protection as every other one accused of a like offense, and that no discrimination can be made between individuals. Hence, when Congress here provided that all judgments of the several kinds designated in the criminal appeals act, were reviewable by this court, it complied strictly with this principle, because it enacted a general law which is applicable to every offender in whose case a judgment of such character is rendered; and, therefore, the statute is subject in no respect to the criticism of partiality.

Furthermore, there is in substance no difference between the right of review in these cases possessed by the United States and of that possessed by the defendant. It is true that if, in the first case, the demurrer, or in the second, the motion to quash, had been overruled, the defendant could not at once have brought the judgment of the court directly to this court for review. But, if tried and convicted, under section 6 of the act of March 3, 1891, ch. 517 (26 Stat., 828), he could have prosecuted a writ of error to the circuit court of appeals for his circuit, and if the judgment had been there affirmed, he could have had the question reviewed by this court on petition for writ of certiorari. By the provisions of that act, every criminal case is subject to review

by this court. In those cases wherein the jurisdiction of the court below is in issue, or wherein a conviction for a capital offense has been had, or which involves a constitutional question, the case may be brought directly to this court; while all other cases may be brought here at the instance of the defendant by writ of certiorari, after an affirmance of the judgment by the Circuit Court of Appeals.

IV.

The court has jurisdiction to review the judgments of the court below in both cases, No. 380 and No. 671, because said judgments were based upon an erroneous construction of section 5209, Revised Statutes.

It is insisted that the court below construed the indictments and not the statute upon which they rest, and consequently that the appeal does not fall within the province of the criminal appeals act. A like insistence was made in *United States* v. *Keitel* (211 U. S., 385), *United States* v. *Biggs* (211 U. S., 518), and *United States* v. *Corbett* (215 U. S., 237), but was overruled.

The ground upon which the court sustained the demurrer to the first fifteen counts of the indictment in case No. 380, is thus stated by the court:

> The crime of which defendant is guilty, if guilty at all, is "wilful misapplication." The one characteristic or essential of this crime, on which the Supreme Court has always insisted, is conversion; no method of being guilty without converting the money, funds, or credits of the bank has been pointed out. *This word*

conversion has supplied the legal measure which the court has not been able to find in "willful misapplication." If the facts stated in an indictment do not set forth a case of conversion, the indictment is bad, and a general allegation of wrongful intent will not cure it. Taking the first count, for example, could the bank have maintained an action for conversion against the recipient of the discount proceeds under the facts stated? I think not, and am therefore of opinion that counts 1–15 are demurrable.

One of the grounds for quashing the counts in the indictment in No. 671 was the same as here expressed. Clearly, therefore, the judgment of the court was based upon his construction of the word "misapplication" as used in section 5209, Revised Statutes—that is, the court held that in order to constitute a misapplication within the meaning of this statute, *when the funds misapplied are delivered by the bank official to a third person, it is necessary that the indictment state such facts as would justify a recovery of a judgment by the bank against such third person in an action brought for conversion.*

The question, therefore, is, taking the indictment as construed by the court, does the statute admit of any such a meaning? Does it require that a case of conversion shall be made out against the third party who receives the money?

One branch of the *Corbett case* did not present so clear a ground for review by this court as is here presented. In that case the indictment alleged that the defendant made certain false entries with intent to

injure the bank, but in stating the character of the false entries, it appeared that they were made in a report to the comptroller, and that they in fact showed that the bank was in a better condition than actually existed. The court below held that such a false entry could not possibly have injured the bank, and consequently could not have been made with any such intent; but this court took the view that it did not follow, as a matter of law, that because the report showed a more favorable condition than existed, the bank could not have been injured thereby, and that the intent to injure could not have existed. The court must have taken jurisdiction of that question upon the ground that the determination whether such allegations set forth sufficiently an unlawful intent, involved the interpretation of the word "intent" as used in section 5209, and not merely a construction of the indictment.

In the present case there can be no doubt that the result hinges solely upon the meaning that shall be given to the word "misapplication" as used in the statute.

V.

This court has jurisdiction of Case No. 671, notwithstanding one ground for quashing the indictment is not reviewable by this court.

The case of *United States* v. *Stevenson* (215 U. S., 190), presented a similar condition. In that case the court below quashed the indictment on two grounds, first, because not sustained by the statute; and,

second, because it was bad on principles of general law. This court refused to consider the second ground, but did consider the first, and reversed the judgment of the court below, and *remanded the case for further proceedings in conformity with the opinion.* The reason assigned for assuming jurisdiction under such circumstances was that it was the purpose of Congress in passing the Criminal Appeals Act to provide a method whereby the United States, in any case wherein a judgment of either of the kinds mentioned had been pronounced, might procure a construction by this court of the statute upon which the indictment was based, the result in the particular case not being a matter of such prime importance as a final determination by this court of the statutory question presented. And the case was no doubt remanded because it was presumed that if the court below should adhere to his former opinion with reference to the validity of the indictment on general principles, the defendant would be held until the matter could be resubmitted to the grand jury.

If the court below was in error in construing section 5209, Revised Statutes, and in holding, in consequence of such misconstruction, that the indictment did not state a case under that statute, there is greater reason than existed in that case why the present one should be remanded to the court below for further proceedings, because the other ground upon which the counts in question were quashed did not involve a general principle of law, but a matter

which the court held fell within his discretion; and if the counts be in fact good it will require no resubmission to the grand jury and the finding of a new indictment. Furthermore, subsequent proceedings in the case may have been such that if the counts are good justice would demand that the discretion of the court be exercised in overruling the motion to quash; as, for instance, if a trial has been had upon the lettered counts, and the court, after hearing the Government's testimony, quashed said counts on the ground that there was such variance between the offenses as alleged in those counts and the offenses made out by the testimony that a judgment thereon could not be sustained.

VI.

The court was in error in holding that the several counts in question of the two indictments did not sufficiently allege a case of misapplication against the defendant.

It appears useless to attempt to add anything to the able argument of the late Solicitor-General, but a suggestion or two by way of reply to defendant's brief, and to emphasize one or two of the points made in the Government's original brief in case No. 380, may not be out of place.

The court below reached his conclusion in case No. 380 by first assuming that the money alleged to have been converted was received by Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze; and then holding that, under the facts alleged, an action for

conversion of the $100,000 could not be maintained against them.

The court erred in both the assumption and the holding.

1. It is expressly alleged in the several counts of the indictment that the defendant "wilfully, wrongfully, unlawfully, and with intent to injure and defraud" the bank and other persons, without the knowledge and consent of the bank or of its officers, "and for the use, benefit, and advantage of the said Fritz Augustus Heinze, and other persons to the grand jurors aforesaid unknown," misapplied the moneys in question.

Subsequently, in alleging particularly the method of misapplication, it appears that it was done by discounting a note which had been executed by Otto Heinze & Co., a firm composed of Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze; but it is not there alleged that this note was, at the time, the property of Otto Heinze & Company. To the contrary, from the previous allegation it would appear to have been the property of Fritz Augustus Heinze and persons to the grand jurors unknown.

2. The holding of the court that it was necessary in order to state a case against Fritz Augustus Heinze, the president of the bank, to allege such facts as would support an action for conversion against Otto Heinze & Company (it being conceded that they received the money), is wholly unwarranted by section 5209, Revised Statutes, and by the decisions of this and other courts construing the same.

It should be kept in mind that this indictment is not directed against the members of the firm of Otto Heinze & Company, *but is directed solely against the defendant Fritz Augustus Heinze, the president of the bank, and consequently the only matter with which the court is now concerned is whether or not a conversion is charged against Fritz Augustus Heinze;* and upon this question there can be no doubt. It was unnecessary to charge specifically that the makers of the note, Otto Heinze & Company, were insolvent, inasmuch as the allegations that the defendant knew that the note was "not secured at all," and that he discounted the same with intent to defraud the bank, and that the money was lost to the bank, were equivalent to such charge.

In *Evans* v. *United States* (153 U. S., 593) the court had before it an indictment in this respect precisely like the present one, and there said:

> An averment that Evans was at the time insolvent, or knew himself to be so, was also unnecessary, in view of the allegation that Evans knew that the note was not secured and procured the same to be discounted with intent to defraud the bank.

Furthermore, the allegation that the defendant willfully, wrongfully, unlawfully, and with intent to injure and defraud the bank misapplied the funds of the bank is an allegation of fact, and it is not necessary to set out the evidence from which such intent might be inferred. This question is likewise settled

in *Evans* v. *United States* (*supra*), the court using the following language:

> Defendant's entire criticism upon these counts seems to be founded upon the hypothesis that no weight whatever is to be given to the words "knowingly, wilfully, unlawfully, and fraudulently," or to the general allegation of an intent to defraud—in short, that these words are mere surplusage. Where, however, the statute uses words which are not absolutely inconsistent with an honest purpose, such as was held by this court in *Britton's case* were the words "wilfully misapplied," the allegation of an intent to defraud becomes material in the highest degree. In fact the gravamen of the offense consists in the evil design with which the misapplication is made, and a count which should omit the words "wilfully," etc., and "with intent to defraud," would be clearly bad. While it is entirely true that an allegation of fraud is insufficient, either in an indictment or in a bill in equity, without giving the particulars of the fraud, an intent to defraud is only to be gathered by the jury from all the facts and circumstances of the case. There is no greater need of setting out the evidence to prove such intent than there would be of averring in detail the evidence of a *scienter*, or of any other fact material to the offense. Where the intent is a material ingredient of the crime it is necessary to be averred; but it may always be averred in general terms, as in a case of assault with

> intent to kill. So, in an indictment for murder, it is necessary to aver that the killing was done "wilfully, feloniously, and of malice aforethought," but the evidence that it was so done, though necessary to be given, is not necessary to be set forth.

In accord with this holding is *United States* v. *Simmons* (96 U. S., 360, 364); *United States* v. *Corbett* (215 U. S., 233, 243).

Consequently, under the allegations of this indictment it must be treated as facts that the defendant willfully and with intent to injure and defraud the bank misapplied the $100,000 in question by paying out the same for a note executed by Otto Heinze & Co. when said note was wholly unsecured; and further, that as a result of paying out the same, with the knowledge and intent alleged, the bank lost the $100,000.

Now, can there be the least doubt that under these allegations the bank could maintain against *the defendant* an action for conversion? In 28 A. & E. Ency. Law, 679, it is said:

> It may be stated as a general rule that every act of control or dominion over personal property without the owner's authority, and in disregard and violation of his rights, is, in contemplation of law, a conversion.

Other definitions of a conversion are as follows:

> A "conversion," in the sense of the law of trover, is defined by Mr. Greenleaf to consist in either the appropriation of a thing to the party's own use and beneficial enjoyment, or

> its destruction, or in exercising dominion over it in exclusion or defiance of the plaintiff's right, or in withholding the possession of the plaintiff under a claim of title inconsistent with his own. (2 Words and Phrases, 1562.)

Against:

> A "conversion" consists of some act of dominion exerted over one's property in denial of his right or inconsistent with it. (Id.)

Also:

> "Conversion" is any dealing with the thing which impliedly or by its terms excludes the owner's dominion. (Id.)

And, again:

> A conversion of property is an act of malfeasance, not of mere nonfeasance; a positive wrong, and not the mere omission of what was right. A wrongful taking or assumption of a right to control or dispose of property constitutes a conversion. Indeed, any wrongful act which negatives or is inconsistent with the owner's right is *per se* a conversion. It is not necessary that the party guilty of the conversion should have made use of the property in any way. Does he exercise a dominion over it in exclusion or in defiance of plaintiff's right? If he does, that is in law a conversion, be it for his own or another person's use. (Id., 1563.)

Numerous authorities are cited in support of these several definitions.

Furthermore, it is not necessary that any advantage accrue to the defendant from the conversion.

(28 A. & E. Ency. Law, 682, and the many cases cited).

Consequently, if an action for conversion of the $100,000 were brought against the defendant, and the facts were conceded to be as alleged in these counts of the indictment, a judgment for the bank would necessarily follow.

Neither section 5209, nor any case construing the same, can be cited in support of the court's holding that if the money misapplied goes to a third party, it is necessary to allege such a state of facts as would make out a case against such party, unless he be jointly indicted with the bank official. In *Britton* v. *United States* (107 U. S., 655, 666), which is the leading authority upon this question, the court had under consideration certain counts of an indictment in which it was alleged that the president, Britton, had purchased with the bank's funds certain shares of its stock, which shares he had held for the bank; and the court held that while it was an irregular and unlawful transaction, yet it was not a criminal act, because inasmuch as the stock was held for the bank, the bank's funds were not converted; and, as to what constituted a misapplication within the meaning of the statute, the court said:

> We think the willful misapplication made an offense by this statute means a misapplication for the use, benefit, or gain of the party charged, or of some company or person other than the association. Therefore, to constitute the offense of willful misapplication,

> there must be a conversion to his own use or the use of some one else of the moneys and funds of the association by the party charged. This essential element of the offense is not averred in the counts under consideration, but is negatived by the averment that the shares purchased by the defendant were held by him in trust for the use of the association, and there is no averment of a conversion by the defendant to his own use or the use of any other person of the funds used in the purchase of the shares. The counts, therefore, charge maladministration of the affairs of the bank, rather than criminal misapplication of its funds.

In *Dow* v. *United States* (82 Fed., 904, 906), the Circuit Court of Appeals, Eighth Circuit, said with reference to a misapplication:

> To complete a misapplication of the funds of the bank, *it was necessary that some portion thereof should be withdrawn from the possession or control of the bank*, or a conversion in some form should be made thereof, so that the bank would be deprived of the benefit thereof.

In *United States* v. *Harper* (33 Fed., 471, 478), Judge Jackson (subsequently Mr. Justice Jackson), in charging the jury as to what constituted a misapplication within the meaning of section 5209, said:

> In order to constitute the offense of misapplication, it is not necessary, gentlemen of the jury, that the accused should have been previously in the actual possession of such moneys, funds, and credits under or by virtue

> of any trust, duty, or employment committed to him. The statute makes it a criminal offense for any president, cashier, teller, clerk, or agent of a national bank to willfully misapply its assets. Such willful misapplication may be either for his own use or for the benefit or advantage of some company or person other than the association. It is not necessary to the commission of this offense that the officer making the willful misapplication should derive any personal benefit from the transaction. *When the funds or assets of the bank are unlawfully taken from its possession and afterwards willfully misapplied by converting them to the use of any person other than the bank with intent to injure or defraud, the offense as described in the statute is committed.* This criminal act may be done directly and personally by the accused, or it may be done indirectly through the agency of another. If the officer charged has such control, direction, and power of management by virtue of his relation to the bank as to direct an application of its funds in such manner and under such circumstances as to constitute the offense of willful misapplication and actually makes such direction, or causes such misapplication to be made, he is equally as guilty as if it was done by his own hands.

For other definitions of a misapplication, see defendant's brief in No. 380, pages 28 and 29, all of which are of the same tenor as the above.

It will thus be noted that in speaking of a conversion *the courts have nowhere intimated that liability for*

conversion should exist against anyone other than the bank officer charged in the indictment; and while ordinarily the party who receives the funds from the officer of the bank under such circumstances as make such officer criminally liable for misapplication is also liable for the conversion, yet such is not necessarily true. It can be easily conceived that the officer might know of the insolvency of the third party when he (the third party) himself would be unaware of such fact, and would therefore present his paper for discount in the best of faith. For illustration, suppose a person holds $100,000 of stock in a corporation with the financial condition of which he is wholly unfamiliar, while the president of the bank is perfectly familiar with its condition, and knows that the corporation is insolvent, and further knows that the stock in this corporation is all the assets possessed by the stockholders.

Suppose, further, that such individual should present to the bank his note for discount, with the $100,000 of stock as collateral, and the note should be executed and the money delivered to such person by the president, such transaction being had upon the part of the president willfully and with intent to defraud the bank. Could it be insisted with reason that the innocence of the third person, and his belief that he was entirely solvent, would absolve the president from punishment? It might be insisted that in such a case the third party, though fully believing that he was solvent, would be technically liable for a conversion; but if such be the fact, then,

under the allegations of the present indictment, the drawers of the note, Otto Heinze & Co., were also liable for a conversion, and the case is made out even under the theory adopted by the court below.

With reference to money and negotiable instruments, an action of conversion will not lie against an innocent purchaser; and, consequently, such action must be confined to the party who disposes of them to such purchaser.

In *Talty* v. *Freedmens Savings & Trust Co.* (93 U. S., 321, 326), Talty assigned to one Kendig a claim against the city of Washington for $6,096.75 and authorized Kendig to procure for him a loan of $3,000, and to place this claim, which was then in the form of an approved voucher, as collateral to secure such loan. Kendig procured the loan and afterwards sold the claim to the bank at 96 cents on the dollar, and when Talty paid the loan and demanded his claim back, Kendig claimed that he was authorized by Talty to sell the claim at 90 cents and offered to pay Talty the 90 per cent, which Talty refused to accept. He then brought an action for conversion against the bank. The court dismissed his action, primarily on the ground that he had failed to first give notice of his claim to the holder; but it also cited a number of decisions in support of the proposition that a bona fide purchaser of negotiable instruments, under such circumstances, acquires a good title thereto. While the court then did not expressly adopt such principle, yet it is well settled by other authorities that such

is the law. See *McNeil* v. *Tenth National Bank* (46 N. Y., 325), *State of Nebraska* v. *Omaha National Bank* (59 Nebr., 483, 492), *Fatman* v. *Lobach* (1 Duer (N. Y. Sup.), 354).

Let a similar state of facts be supposed as to an officer of a bank. Suppose that he takes negotiable instruments therefrom and sells them to an innocent purchaser, can the fact that the innocent purchaser is not liable for conversion be successfully pleaded as a defense by the officer?

Counsel, in their reply brief, have mentioned a number of objections to the indictment, but inasmuch as the court below based its decision upon the one ground, that no case of conversion was made out against the recipient of the money when it was necessary to do so, other questions will not be considered by the court. However, a few words in reply to these suggestions are not amiss.

1. It is said that the *Evans case* is not authority for the contention that it was unnecessary for the indictment to allege the insolvency of Otto Heinze & Co., the makers of the several notes discounted.

The court, in stating the substance of the counts then under consideration, said:

> The fourteenth count, which may be treated as a representative of all the "unlawful discount" counts, charged in substance that Evans knowingly, wilfully, unlawfully, and fraudulently aided and abetted the cashier to wilfully misapply the money, funds, and credits of the bank for the use, benefit, and advan-

> tage of the defendant, with the intent on defendant's part to injure and defraud the bank, in that the said cashier knowingly, unlawfully, fraudulently, and wilfully, with the intent to defraud the bank, and for the use, etc., of the said Evans, misapplied the sum of $15,000 by receiving and discounting, with the money and funds of the bank, a note made by Evans for this amount (giving copy), which note, when so discounted, "was not then and there well secured," as the cashier and Evans both well knew, and which note was never paid, by reason of which the bank suffered loss in this amount, with intent, in the said Evans,to injure and defraud the bank (p. 591).

It is apparent that the substance of the counts there under consideration and those here involved are precisely the same. It is sought, however, to draw a distinction from the fact that the notes there discounted were executed by Evans himself and that he must, therefore, have known of their worthlessness; but clearly one may know as well of the insolvency of another person as of his own insolvency. What the court held was that the allegations that the notes were unsecured, that they were received and discounted, willfully and fraudulently, with intent to defraud the bank, and that the money was lost to the bank, necessarily embraced the allegation that Evans knew of his own insolvency. So, in the present case, the like allegations necessarily include an allegation of knowledge upon the part of the defendant of the insolvency of Otto Heinze & Co.

2. It is said that there is no allegation that a demand had been made for the payment of the notes, and as they were demand notes it is therefore not shown that they were worthless. (Brief, p. 26.)

No demand was necessary and consequently it is unnecessary to allege any such demand. The offense was complete when the notes were discounted. It had as well be insisted that no prosecution can be had until a note which runs for a definite time has matured, as it can not be known that it will not be paid until after maturity.

3. It is also said that no unlawful taking is alleged, as it is not stated who received the moneys of the bank on the discount. (Brief, p. 26.)

The conclusion does not at all follow from the omission stated. So far as the bank is concerned, it can make no difference who received its funds. The material fact is that it lost the money. If the defendant had taken the funds in question and thrown them into the ocean, with the intent to defraud and injure the bank, he would be just as guilty as if he had applied them to his own use or had transferred them to some other person.

4. It is also urged that no collusion is alleged between the makers of the notes and the defendant (Brief, p. 27.)

No collusion is necessary. As just stated, the vital fact with the bank is that it lost its funds, and the fact which makes the defendant liable is that he was the party who, with unlawful intent, caused the loss by the misapplication of such funds.

For the reasons above stated and those set forth in the original brief filed by the Government in case No. 380, the judgments in both cases should be reversed and they be remanded for further proceedings.

J. A. FOWLER,
Assistant Attorney-General.

NOVEMBER, 1910.

O

Supreme Court of the United States,

OCTOBER TERM, 1909.

No. 380.

UNITED STATES,
Plaintiff-in-Error,

vs.

FRITZ AUGUSTUS HEINZE,
Defendant-in-Error.

In Error to the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR DEFENDANT-IN-ERROR.

Statement.

This is a writ of error sued out by the United States under the act of Congress approved March 2, 1907 (Chap. 2564, 32 Stats., 1246), entitled "An Act providing for writs of error in certain instances in criminal cases," to review the decision and order of the Circuit Court of the United States for the Southern District of New York, sustaining the demurrer of the defendant-in-error to counts 1 to 15, inclusive, of an indictment returned into said court against the defendant-in-error, for alleged violation of Section 5209 of the Revised

Statutes of the United States, and charging the defendant-in-error with the crime of wilfully misapplying the funds of the Mercantile National Bank by discounting (as President of the bank) fifteen separate notes severally set out in each of the counts respectively. The demurrer to the remaining 16th count of the indictment was overruled.

The decision of the Court below is as follows (Rec., 29):

> "With respect to indictments for misapplication under Section 5209, I have expressed fully my views in the Morse case, 161 F. R., 429, and on the first indictment against the defendant, 161 F. R., 425. The present discussion had not rendered it necessary (so far as I can see) to say much more.
>
> This indictment seems to me to charge in counts 1-15 this and no more, viz., that with intent to defraud the bank, of which he was President, and for the benefit of himself and others unnamed, defendant caused the bank to discount single name commercial paper and the bank lost the amount paid on the discount.
>
> The sixteenth count varies from the others only in stating that the person responsible on the discounted note was insolvent, to the knowledge of the defendant, at the time of the discount.
>
> The crime of which the defendant is guilty, if guilty at all, is 'wilful misapplication.' The one characteristic or essential of the crime on which the Supreme Court has always insisted, is conversion; no method of being guilty without converting the money, funds or credits of the bank has been pointed out. This word 'conversion' has supplied the legal measure which the Court has not been able to find in 'wilful misapplication.'
>
> If the facts stated in an indictment do not set forth a case of conversion, the indictment is bad and a general allegation of wrongful intent will not cure it.

Taking the first count, for example—could the bank have maintained any action for conversion against the recipient of the discount proceeds under the facts stated? I think not, and am therefore of opinion that counts 1-15 are demurrable.

The sixteenth count is also asserted to be had under the Britton decision in 108 U. S., 193, but this was explained in the Fish case, 24 F. R., 585, in the manner I have tried to summarize, on page 433 of 161 F. R. Does the count sufficiently charge that the discount was originally procured by fraudulent means? And does it or can it amount to a conversion, for a bank President to discount the notes of one insolvent? It appears to me that both questions should be answered affirmatively and the demurrer to the sixteenth count overruled.

It is much to be hoped that the decision will be reviewed; anything more unsatisfactory than the ruling cases on 'wilful misapplication' I have rarely met.

C. M. HOUGH,
D. J.

Sept. 10, 1909."

Section 5209 of the Revised Statutes, under which the indictment has been found, provides as follows:

"SEC. 5209. Every president, director, cashier, teller, clerk or agent of any association who embezzles, abstracts or wilfully misapplies any of the moneys, funds or credits of the association, or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, signs any note, bond, draft, bill of exchange, mortgage, judgment or decree; or who makes any false entry in any book, report or statement of the association with intent in either case to injure or defraud the association, or any other company, body politic or corporate, or any individual person, or to

deceive any officer of the association or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk or agent in any violation of this section, shall be deemed guilty of a misdemeanor and shall be imprisoned not less than five years nor more than ten."

The entire indictment is set forth in the record (R., 2-23) and the counts which are here for review are each in the same form and contain the same general allegations, the differences being (*a*) in the amounts and names of the makers of the several notes therein set out, and (*b*) the averment in counts 1, 2, 3, 4, 5, 6, 7, 8, 9 and 15 that the note "when so received and discounted, as aforesaid, was "not then and there well secured and in fact not se-"cured at all," whereas, counts 10, 11, 12, 13 and 14 aver only that the note there charged upon "was not then and there well secured."

For convenience we here set out the first count of the indictment which is as follows (R., 2):

"The Grand Jurors for the United States "of America empaneled and sworn in the Cir-"cuit Court of the United States for the "Southern District of New York and inquir-"ing for that district, upon their oath pres-"ent that on the 14th day of March, A. D., "1907, at the said Southern District of New "York, one Fritz Augustus Heinze was the "president of a certain national banking as-"sociation, a body corporate, then and there "known and designated as The Mercantile "National Bank of the City of New York, "in the City of New York, in the County of "New York, in the State of New York, which "said national banking association had been, "theretofore created, organized and estab-"lished and was then existing and doing "business in the City of New York and "County of New York in the district afore-"said under the Laws of the United States.

"That he, the said Fritz Augustus Heinze "so being president of said national banking "association as aforesaid and by virtue of "the official relation of said Fritz Augustus "Heinze as president of said national bank-"ing association and by virtue of the power "of control, direction and management which "said Fritz Augustus Heinze as such presi-"dent of said national banking association "possessed over the moneys, funds and cred-"its of said national banking association, on "the said 14th day of March, A. D., 1907, "then and there at said City of New York "and County of New York and district afore-"said, did wilfully, wrongfully, unlawfully "and with intent to injure and defraud said "national banking association and divers "other persons to the grand jurors aforesaid "unknown, without the knowledge and con-"sent of the said national banking associa-"tion, its board of directors and committees, "and for the use, benefit and advantage of "the said Fritz Augustus Heinze and other "persons to the grand jurors aforesaid un-"known, misapply certain of the moneys, "funds and credits of the said national bank-"ing association, to wit, the sum of One "hundred thousand ($100,000.) dollars, and "of the value of One Hundred thousand "($100,000.) dollars, in the manner and by "the means following, that is to say, that he, "the said Fritz Augustus Heinze as presi-"dent as aforesaid of said national banking "association did, on the said 14th day of "March, A. D., 1907, wilfully, wrong-"fully, unlawfully and with intent "to injure and defraud said national "banking association and said divers "other persons to the grand jurors afore-"said unknown, then and there receive and "discount with the moneys, funds and credits "of said national banking association a cer-"tain promissory note made and drawn by "Arthur P. Heinze, Otto C. Heinze and Max "H. Schultze, partners doing business "under the firm name of Otto Heinze & Co., "which said note was signed with the firm

"name of Otto Heinze & Co., and dated on "the 14th day of March, A. D., 1907, and for "the sum of One hundred thousand "($100,000.) dollars, due and payable on de- "mand a more particular description of "which said note is to the grand jurors "aforesaid unknown, and which said promis- "sory note when so received and discounted "as aforesaid was not then and there well "secured, and in fact not secured at all, "which fact he, the said Fritz Augustus "Heinze, then and there well knew, and which "said amount of One hundred thousand "($100,000.) dollars, it being the proceeds of "the discount of said note aforesaid, was "wholly lost to the said national banking as- "sociation.

"And so the jurors aforesaid upon their "oath aforesaid do say, that he, the said "Fritz Augustus Heinze as such president "of said national banking association as "aforesaid in manner and form and by the "means and for the use and benefit and with "the intent and without the knowledge and "consent aforesaid, one hundred thousand "($100,000.) dollars of the said moneys, "funds and credits of said national banking "association, wrongfully and unlawfully did "then and there willfully misapply, contrary "to the form of the statute in such case made "and provided against the peace and dignity "of the United States of America."

The material errors assigned in support of the Government's pending writ are (R., 31)

"III. The Court erred in holding as mat- "ter of law that counts 1 to 15, inclusive, "of the indictment herein were insufficient "in law.

"IV. The Court erred in holding in refer- "ence to counts 1 to 15, inclusive, of the "indictment herein that it was necessary to "set forth all of the facts incident to a mis- "application of national bank funds in order "to show that there was a misapplication of "such funds."

ARGUMENT.

The points to be made for the defendant-in-error are:

1. The pending writ of error is not within the Act of March 2, 1907, and should be dismissed.

2. The Act of March 2, 1907, is not applicable to this case.

3. The questions presented by the writ of error, so far as they affect the order sustaining the demurrer to counts 1-15, are not whether those counts are good or bad, but under the limited character of the error assigned present for discussion but two questions:

First.—Did the Court below in reaching its decision construe Section 5209 of the Revised Statutes of the United States?

Second.—If, as matter of fact, it did construe the Statute and its decision was predicated upon the construction given, was that construction correct?

4. The Court below did not attempt to construe, nor did it construe, Section 5209 of the Revised Statutes of the United States.

5. If it be assumed that the Court in its decision did construe Section 5209 of the Revised Statutes, the extent of its construction was to assert that to constitute the offense of willful misapplication under the Statute there must be a conversion to the use of the offender or of some one else of the moneys or funds of the association by the party charged, and such a construction is unquestionably correct.

6. The counts in question are not good under the decision of this Court in *United States* v. *Evans*, 153 U. S., 587.

I.

The pending writ of error is not within the Act of March 2, 1907, and should be dismissed.

We earnestly insist that this is *not* a case here open to review by the United States under the Act of March 2, 1907, (34 Stats., 1246).

For certainty and convenience we here quote that Act in full:

> "Chap. 2564.—An Act Providing for writs "of error in certain instances in criminal "cases.
>
> "Be it enacted by the Senate and House "of Representatives of the United States of "America in Congress assembled, That a "writ of error may be taken by and on behalf "of the United States from the District or "Circuit Courts direct to the Supreme Court "of the United States in all criminal cases, "in the following instances, to wit:
>
> " 'From a decision or judgment quashing, " 'setting aside, or sustaining a demurrer to, " 'any indictment, or any count thereof, " 'where such decision or judgment is based " 'upon the invalidity, or construction of " 'the statute upon which the indictment is " 'founded.
>
> " 'From a decision arresting a judgment " 'of conviction for insufficiency of the in- " 'dictment, where such decision is based " 'upon the invalidity or construction of the " 'statute upon which the indictment is " 'founded.
>
> " 'From the decision or judgment sustain- " 'ing a special plea in bar, when the defend- " 'ant has not been put in jeopardy.
>
> " 'The writ of error in all such cases shall " 'be taken within thirty days after the de- " 'cision or judgment has been rendered and " 'shall be diligently prosecuted and shall " 'have precedence over all other cases.

"'Pending the prosecution and determina-
"'tion of the writ of error in the foregoing
"'instances, the defendant shall be admitted
"'to bail on his own recognizance: *Provided*,
"'That no writ of error shall be taken by or
"'allowed the United States in any case
"'where there has been a verdict in favor
"'of the defendant.'"

"'Approved, March 2, 1907' (34 Stat., "1246)."

Under authority of that Act this Court recently heard and decided the case of *United States* vs. *Keitel*, 211 U. S., 370. There the Trial Court had construed certain Federal statutes, viz., Section 5440, U. S. Revised Statutes—the conspiracy section, and sections 2347-2350, providing for the sale of coal lands belonging to the United States, and upon such construction of the *Statute* held the offence charged in the indictment did not exist.

In the Opinion of this Court (p. 386), it was said:

"Putting aside for the moment technical "objections to the sufficiency of the indict-"ment, it is conceded by both sides that if "the statutes which the Court below con-"strued be given the meaning which the "United States by the assignments of error "assert is the correct one, an offense against "the United States was stated in both counts "of the indictment. The construction of the "statutes, therefore, is the real question for "decision. We propose to examine the "statutes applicable to each count separate-"ly, and in doing so to weigh the conflicting "contentions urged in argument bearing on "the question of the true construction. We "reserve, however, for final consideration "various contentions relating merely to the "construction of the indictment as a plead-"ing, by which the United States contends "that the Court below was wrong, even, if "for the sake of argument, it be assumed that "its construction of the statutes was right

> "and by which the defendants in error con-
> "tend that the order quashing the indict-
> "ment was right, even if the Court was
> "wrong in its view of the law, because of de-
> "fects in the indictment."

Thereupon the opinion proceeds to analyze these statutes, and reaching conclusion thereon adds (p. 397):

> "Finally we come to the two contentions
> "of the Government which we have hitherto
> "temporarily put aside, and to the various
> "contentions on the part of the defendants-
> "in-error, insisting either that the court be-
> "low misconstrued the indictment, or that
> "there were such defects in the indictment
> "that it was rightly quashed, irrespective of
> "the construction of the statutes which led
> "the court below to do so. But we do not
> "think we have jurisdiction on this writ of
> "error to consider these questions. The right
> "of the United States to come directly to this
> "court because of the construction of the
> "statutes by the court below, as we have pre-
> "viously said in considering the question of
> "jurisdiction, is solely derived from the act
> "of 1907, the text of which is printed in the
> "margin. That act, we think, plainly shows
> "that in giving to the United States the right
> "to invoke the authority of this court by
> "direct writ of error in the cases for which it
> "provides it contemplates vesting this court
> "with jurisdiction only to review the particu-
> "lar question decided by the court below for
> "which the statute provides. In other words,
> "that the purpose of the statute was to give
> "the United States the right to seek a review
> "of decisions of the lower court concerning
> "the subjects embraced within the clauses of
> "the statute, and not to open here the whole
> "case. We think this conclusion arises not
> "only because the giving of the exceptional
> "right to review in favor of the United States
> "is limited by the very terms of the statute
> "to authority to re-examine the particular
> "decisions which the statute embraces, but

> "also because of the whole context, which "clearly indicates that the purpose was to "confine the right given to a review of the "decisions enumerated in the statute, leav- "ing all other questions to be controlled by "the general mode of procedure governing "the same. It follows from what we have "said that the court erred in its construction "of the statutes by which it quashed the first "count of the indictment, and that from a "rightful construction of the statutes no "error was committed in quashing the second "count. The order, therefore, quashing the "first count is reversed and that quashing the "second count is affirmed, and the case is re- "versed and remanded for further proceed- "ings in conformity to this opinion."

Examination of the Court's decision *here* and the assignment of errors accompanying the Government's writ of error, renders it transparently clear that *all* the Court below has done in present case is *not* to construe the statute, but simply and solely "the CONSTRUCTION OF THE INDICTMENT AS A PLEADING," the very thing sought by the United States to be reviewed in the Keitel case and which the Court as clearly *refused* to do, saying:

> "But we do not think we have jurisdiction "on this writ of error to consider these ques- "tions."

U. S. *v.* Stevenson, 215 U. S., 190, 195:

> "Inasmuch as the United States could not "bring such a case here after final judgment, "it was intended to permit a review of such "decisions as are embraced within the statute "at the instance of the Government, in order "to have a final and determinative construc- "tion of the act, and to prevent a miscarriage "of justice if the construction of the statute "in the Court below was unwarranted."

We submit the writ of error should hence be dismissed.

We urge this contention with added reason because it is manifest that the extraordinary and unilateral privilege given the United States *alone* for review in this Court, *which is denied the defendant*, should limit the United States to the very cases so plainly expressed by the Act of 1907, and be in no manner enlarged by assumed intendment.

II.

The Act of March 2, 1907, is not applicable to this case.

It is earnestly submitted that the Act of March 2, 1907, entitled "An Act providing for writs of error in certain instances "in criminal cases" is not applicable to this case. Thereby the right of review in this Court is conferred upon the plaintiff—the United States ALONE in cases involving construction of the federal laws, while denying it to the defendant in every form and at every stage of the case where not involving a capital crime. In other words, the right is wholly unilateral. It opens the doors of this Court to the United States as one party to the cause only, and denies the same privilege to the defendant.

By Article 5 of the amendments to the Federal Constitution it is provided that, *inter alia*, no person shall be "deprived of *life, liberty or property* "*without due process of law.*"

And by Article 14 of the amendments to the Constitution, Section 1, it is distinctly provided:

> *"Nor shall any state deprive any person of "life, liberty or property, without due process "of law; nor deny to any person within its "jurisdiction the equal protection of the "laws."*

That these prohibitions apply also to the United States is made clear by the positive ruling of this Court to that effect announced in the *Sinking Fund* cases (99 U. S., 700), where, speaking for the Court (p. 718), Mr. Chief Justice Waite said:

> *"The United States cannot, any more than "a state, interfere with private rights, except "for legitimate Governmental purposes. "They are not included within the constitu- "tional prohibition which prevents States "from passing laws impairing the obligation "of contracts, but equally with the States "they are prohibited from depriving persons "or corporations of property without due "process of law."*

This is a clear and conclusive declaration that the United States Government is on exact footing with the States in respect to the prohibitions set forth in the 14th Amendment to the Federal Constitution. For it is manifest that if the Unied States are thus prohibited from taking property "without due process of law," the prohibition must extend to the three natural and inherent rights expressly recognized, to wit: "of life, liberty or property." And it needs no additional argument to further demonstrate that, as the Federal Government is thus equally with the States bound by these prohibitions, the same Federal Government must on original principles be bound also by the further prohibition of the 14th Amendment, to wit: "nor deny to any person within its jurisdiction the equal protection of the laws."

Prior to the enactment of the Court of Appeals Act of March 3, 1891, the right of review in this Court upon questions of *law* to a convicted criminal defendant was recognized, but by Section 5 of that Act direct writ of error was given to this Court from the trial Court only "In cases of con- "viction of a capital or otherwise infamous crime" (26 Stats., p. 827).

By Section 6 of the same Act the judgments of the Circuit Court of Appeals were otherwise made final in cases arising "under the criminal laws * * *."

By the Act of January 20, 1897 (c. 68, 29 Stat., 492), the words "otherwise infamous" were stricken from the law, so that thereafter direct writ of error to this Court could be taken only by a defendant "in cases of conviction of a caiptal crime." In all other cases the review stops in the Court of Appeals, unless of course it be a case involving the construction or application of the Constitution or the constitutionality (*not the construction*) of any law of the United States."

Now, it is obvious that when the Congress by the recent enactment permitted the United States to bring by direct writ of error to this Court the cases enumerated in the Act of March 2, 1907, and used the exclusive language therein, "and writ of error "may be taken by and on behalf of the United States "from the district or circuit courts direct to the Su- "preme Court of the United States in all criminal "cases in the following instances, to wit:" etc., it sought to bar the defendant criminal from like review, where not within Sec. 5 of the Act of 1891, *supra*. In all other cases the convicted defendant has right of review only in the Circuit Court of Appeals, and that review can only come at the *end* of his trial. He is put to that expense and peril although the indictment against him may be wholly bad (as has many times happened), but is at every stage of the case forbidden the right of review upon any question in the Supreme Court, except the construction or application of the Constitution or the constitutionality of any federal statute.

We earnesly submit this is denial of "due process of law," as well as denial of "the equal protection of the laws."

We do not enter upon a minute analysis of the term "due process of law" except to remark that it has been many times ruled by the Courts of the Nation and of the States that the term has its origin and foundation far back of written constitutions. As aptly said by this Court in *Murray* vs. *Hoboken Land Co.* (18 How., 272, 278):

> "The Constitution contains no description "of those processes which it was intended "to allow or forbid. It does not even de- "clare what principles are to be applied to "ascertain whether it be due process. It is "manifest that it was not left to the legisla- "tive power to enact any process which might "be devised. The article is a restraint on "the legislative as well as on the executive "and judicial powers of the Government, and "cannot be so construed as to leave Congress "free to make any process 'due process of "law,' by its mere will. To what principles, "then, are we to resort to ascertain whether "this process, enacted by Congress, is due "process? To this the answer must be two- "fold. We must examine the Constitution "itself, to see whether this process be in con- "flict with any of its provisions. If not "found to be so, we must look to those set- "tled usages and modes of proceeding exist- "ing in the common and statute law of Eng- "land, before the emigration of our ances- "tors, and which are shown not to have been "unsuited to their civil and political condi- "tion by having been acted on by them "after the settlement of this country."

This deliverance is quoted with approval in *Holden* vs. *Hardy* (169 U. S., 366, at p. 391), and continuing the opinion in the latter case adds:

> "It was said by Mr. Justice Miller, in de- "livering the opinion of this court in David- "son *v.* New Orleans, 96 U. S., 97, that the "words 'law of the land,' as used in Magna "Charta, implied a conformity with the 'an-

> "cient and customary laws of the English "people,' and that it was wiser to ascertain "their intent and application by the 'gradual " 'process of judicial inclusion and exclusion " 'as the cases presented for decision shall " 'require, with the reasoning on which such " 'decisions may be founded. Recognizing " 'the difficulty in defining, with exactness, " 'the phrase due process of law,' it is cer- "tain that these words imply a conformity "with natural and inherent principles of "justice, and forbid that one man's property, "or right to property, shall be taken for the "benefit of another, or for the benefit of the "State, without compensation; and that no "one shall be condemned in his person or "property without an opportunity of being "heard in his own defence."

In *People* vs. *King* (110 N. Y., 418, 6 Am. St. Rep., 389) the Court, per Andrews, *J.*, said, at page 423:

> "It is not necessary, at this day, to enter "into any argument to prove that the clause "in the Bill of Rights that no person shall " 'be deprived of life, liberty, or property "without due process of law' (Const. Art. 1, "Sec. 6) is to have a large and liberal inter- "pretation, and that the fundamental prin- "ciple of free government, expressed in these "words, protects not only life, liberty and "property, in a strict and technical sense, "against unlawful invasion by the govern- "ment in the exertion of governmental power "in any of its departments, but also protects "every essential incident to the enjoyment "of those rights."

So in *Chicago R. Co.* v. *Moss & Co.* 60 Miss., 641, 646, the Court in holding invalid an Act imposing attorney's fees in cases against corporations, aptly said:

> "This motion involves the question of the constitutionality of an act entitled 'An Act

> for the relief of certain litigants,' approved Mch. 9, 1882, and found at page 110 of the Acts of 1882. Our view is that it is violative of that principle of equality before the law, and in the Courts, which has ever been the boast of republican institutions. It discriminates between classes of persons, as to the incidents of an appeal from the judgment of an inferior Court, and not as to the subjects of litigation or classes of controversies, *but because of the persons litigant.*
>
> The right of appeal cannot be fettered and clogged with reference to the *parties* litigant or the attitude they occupy as plaintiff or defendant. All litigants, whether plaintiff or defendant, should be regarded with equal favor by the law, and before the tribunals for administering it, and should have the same right to appeal, with others similarly situated. All must have the equal protection of the law, and its instrumentalities. The same rule must exist for all in the same circumstances.
>
> There may be different rules for appeals and their incidents in different *classes of cases,* determined by their *nature and subjects,* but not with respect to the persons by or against whom they are instituted."

It is not necessary to amplify these authorities. It is enough to say that the simple language of the Bill of Rights, as thus expressly written in our own Federal Constitution, declares the three inherent rights of man. Nor can it be doubted that where the legislature attempts to give to the State a remedy by review in its highest Court which it denies to the defendant, there is clearly a consequent denial of "due process of law," as well as like denial of "the equal protection of the laws."

We do not contend that the Act here in question is here inapplicable simply because the right of review in the highest Court of the Nation is given to the United States. Our complaint is that such remedy is wholly unilateral, and being *denied* to

the defendant, the statute as it now exists cannot here apply. Nor is it any answer to this contention to say that because a defendant may after conviction carry his case to some *other* Court for final reivew, there is hence no denial of "due process of law." The distinction is obvious. Where review in any form is given in this Court to the United States or any other party, and denied to the other party to the cause, the plea that such other party may take his case *elsewhere* for final review, we respectfully submit does not meet nor answer the fundamental objection we here raise. Nor does that contention sustain this statute as a valid exercise of legislative power.

Nor can the objection be met by the suggestion that during all the years prior to the enactment of the Act of March 2, 1907, the United States was deprived of right of review in any criminal case. That was matter of deliberate legislative choice and judgment. But when the Congress undertook to confer such right of review in this Court upon the United States ALONE and thereby denied to the defendant the similar right, that was and is an invasion of the Constitutional right of the defendant, because it violates in every just and plain sense the provisions of the Constitution prohibiting denial to any person "of life, liberty or property without due process of law," and also denies to such persons "the equal protection of the laws."

Nor is the contention here made answered by the suggestion that the privilege of appeal is not a vested right in any criminal case. That is not the point here involved. The contention is simply that, where the United States, as party plaintiff, is sought by legislation to be thus favored, to wit: given a right of review in this Court, upon the *construction* of the Federal Statute which, under like circumstances, and even in all stages of the case is denied to the defendant there is resulting

denial of "due process of law" and of "the equal "protection of the laws" within the plain and fair meaning of the Federal Constitution, and that hence such discriminatory legislation must stand condemned. It surely could not be said that in a case involving property rights, the United States could enjoy such unilateral privilege. There can clearly be no distinction in principle in this regard between civil and criminal cases. The words "life," and "liberty" precede the word "property" in the Federal Constitution. The words are thus ranked in their relative importance to the individual, for without "life" and "liberty" there could be no enjoyment of "property."

We submit it must hence result that the Act of March 2, 1907, is inoperative in so far as it seeks to confer upon the United States *alone* the right of review of questions which the defendant may not at any stage of his case bring before this honorable Court for final hearing and judgment. Where the United States seeks to assert such an *exclusive* privilege there is necessarily denial of "due process of law."

Nor is the contention *contra* aided by the language of Article III of the Constitution which after stating the cases of *original* cognizance in this Court there is added:

> "In all the other cases before mentioned, "the Supreme Court shall have such appel- "late jurisdiction, both as to law and fact, "with such Exceptions, and under such Reg- "ulations as the Congress shall make."

Neither "Exceptions" can be made nor "Regulations" prescribed by statute thereunder which *deny* to one party to a cause the right of review in this Court which is sought to be fully conferred upon the other.

Nor is the privilege to be thus given to the United States upon any idea that as Sovereign the Govern-

ment may enjoy such opportunity of review which is denied to the defendant. That is obnoxious to every principle of justice and fair dealing which we have been taught to believe must be accorded to every person in defense of life, liberty and property. We repeat that certainly in respect of cases involving property rights it would not be countenanced. In a case involving condemnation and taking of property—the exercise of the power of eminent domain—it could scarcely be said that the United States could lawfully be given the right of review in this court upon the *construction* of the Statute, whereunder the property was sought to be taken and yet denied to the defendant property owner. Such of course is not now the law, but as the statute law now stands (Act of March 3, 1891) it is perfectly clear that no convicted criminal in cases not involving capital crimes can bring his writ of error to this court to hear and determine *any* of the questions enumerated in the Act of March 2, 1907, except the *validity* of a federal statute. He may do that under Section 5 of the Act of March 3, 1891, and that question *only*. So we have a statute which in respect of human "liberty" shuts the door of the highest court in the land to the defendant while opening it wide to the prosecution.

We submit the Statute must be construed so as to avoid such unilateral and unauthorized result.

III.

THE QUESTIONS PRESENTED BY THE WRIT OF ERROR, SO FAR AS THEY AFFECT THE ORDER SUSTAINING THE DEMURRER TO COUNTS 1-15 OF THE INDICTMENT FILED DECEMBER 3, 1909 (No. 380), ARE NOT WHETHER THOSE COUNTS ARE GOOD OR BAD, BUT UNDER THE LIMITED CHARACTER OF THE ERROR ASSIGNED PRESENT FOR DISCUSSION BUT TWO QUESTIONS:

First: Did the Court below in reaching its decision construe Section 5209 of the Revised Statutes of the United States?

Second: If, as a matter of fact, it did construe that statute and its decision was predicated upon the construction given, was that construction correct?

THE COURT BELOW DID NOT ATTEMPT TO CONSTRUE, NOR DID IT CONSTRUE SECTION 5209 OF THE REVISED STATUTES OF THE UNITED STATES.

It is first to be noticed that Judge Hough in his decision in no way calls attention to any ambiguity in the statute, in no way discusses its meaning, and the words "construe," "construction," "interpret," "meaning," or equivalent words are not to be found in the decision. The argument before him was upon demurrer to an indictment and he begins his decision by stating that with respect to *indictments* for misapplication he has expressed his opinion in the case to which he refers. He then proceeds, not to discuss the statute, but the *indictment as a pleading*, and states what it seems to him to charge. He says:

> "That the crime of which the defendant is guilty, if guilty at all, is 'wilful misapplication.'"

"The one characteristic or essential of this crime on which the Supreme Court has always insisted,"

he adds, "is conversion; no method of being guilty without converting the moneys, funds or credits of the Bank has been pointed out."

In saying this he is not discussing the statute but is referring to decisions of this Court under the statute, and correctly characterizing them. He then adds, "this word conversion has supplied the legal measure which the Court (this Court) has not been able to find in 'wilful misapplication.'" It is therefore the measure of proof, proof which can only be made under proper allegations, that he was considering—in short, the story *as pleaded* in the indictment. There was in his mind the following language of this Court in the case of *United States* v. *Britton,* 107 U. S., 655, where it said at page 669 (a statement repeatedly reiterated in later decisions of this Court):

> "The words 'wilfully misapplied' are, so far as we know, new in the statutes creating offenses, and they are not used in describing any offense at common law. They have no settled technical meaning like the word 'embezzle' as used in the statutes, or the words 'steal, take and carry away,' as used in common law. They do not, therefore, of themselves, fully and clearly set forth every element of the offense charged. It would not be sufficent simply to aver that the defendant 'wilfully misapplied' the funds of the association. This is well settled by the authorities we have already cited. There must be averments to show how the application was made and that it was an unlawful one."

Judge Hough recognized that to charge the crime in the language of the statute would not be sufficient, and he examined the counts to ascertain if there were averments sufficient "to show how the application was made and that it was an unlawful one." He had previously, stripping the counts of their unnecessary verbiage, and disregarding such phraseology as charged the crime in the language

of the statute, and analyzing the counts for the purpose of ascertaining what facts they alleged, summarized the *pleading* as follows:

> *"This indictment seems to me to charge in counts 1-15 this and no more, viz., that with intent to defraud the Bank of which he was president, and for the benefit of himself and others unnamed, defendant caused the bank to discount single named commercial paper and the Bank lost the amount paid on the discount."*

It will be noticed that the language of the Court is extremely guarded, and accurately states the few facts set out. In this connection, too much emphasis cannot be laid upon allegations which the count fails to make.

(A) There was no allegation in the counts stating to whom the proceeds of the discount were actually paid by the Bank.

(B) There was no allegation in the counts stating to whom the demand notes were payable.

(C) There was no statement in the counts that payment of the notes had ever been demanded.

(D) There was no statement in the counts that the notes had not been paid or that the makers were in default.

(E) There was no statement in the counts that the loss to the Bank was due to the discounts.

(F) And finally, there was no statement in the counts that the makers of the notes were then, or at the time of the discounts, insolvent or unable to pay their obligations.

It is a familiar rule of criminal pleading that omissions in an indictment cannot be supplied by intendment or implication, and that where the crime is a statutory one it must be charged with pre-

cision and certainty, and every ingredient of which it is composed must be clearly and accurately set forth.

United States v. *Hess*, 124 U. S., 483;
Pettibone v. *United States*, 148 U. S., 197;
Ledbetter v. *United States*, 170 U. S., 606.

In the *Hess* case, at page 486, the *Court* said:

> *"The general, and, * * * universal "rule on this subject is that all the material "facts and circumstances embraced in the "definition of the offense must be stated or "the indictment will be defective. No es- "sential element of the crime can be omitted "without destroying the whole pleading. The "omission cannot be supplied by intendment "or implication, and the charge must be "made directly and not inferentially or by "the way of recital."*

In the *Pettibone* case, *Mr. Chief Justice Fuller*, at page 202, said:

> *"The general rule in reference to an in- "dictment is that all the material facts and "circumstances embraced in the definition of "the offense must be stated, and that if any "essential element of the crime is omitted "such omission cannot be supplied by intend- "ment or implication. The charge must be "made directly and not inferentially or by "way of recital."*

In the *Ledbetter* case the *Court* expressed itself to the same effect.

The Court below, having accurately and in guarded language stated the few facts set out in the counts, carefully refraining from reading into the counts any allegations by way of intendment or implication, continues:

> *"If the facts stated in the indictment do not set forth a case of conversion the indictment is bad, and a general allegation of wrongful intent will not cure it. Taking the first count for example, could the Bank have maintained an action for conversion against the recipient of the discount proceeds under the facts stated. I think not and am therefore of opinion that counts 1-15 are demurrable."*

The allegation that the bank "discounted" the notes in question conveys no information as to whom the moneys of the bank were paid.

> *"'Discount,' by the usage of the commercial world and the common voice of the dictionaries, means simply 'to buy at a reduction.'"*
>
> *Morse on Banks*, 4th ed., 138, 139-162;
> *Pape* v. *Capitol Bank*, 20 Kansas, 440;
> *Atlantic State Bank* v. *Sereny*, 18 Hun., 36;
> *Tracy* v. *Tallmage*, 18 Barb., 462.

It may be conceded that the Bank bought the notes "at a reduction," but from whom they bought them is not stated. This is doubtless why Judge Hough speaks of "*the recipient of the discount proceeds*," whoever they may have been.

The counts are silent as to where and to whom the notes were payable. All that we know of them, aside from their dates and amounts and the names of their makers, is that they were "*due and payable on demand.*" There is no allegation, however, that their payment has ever been demanded.

Chief Justice Comstock, in *Merritt* v. *Todd*, 23 N. Y., 28, had occasion to consider as between a maker and holder of a demand note (no rights of

third parties intervening) what the contract was. He says:

> *"In short, we see no good reason why a "note like the one in question should not be "construed precisely according to its terms; "and we follow that construction, such in- "struments are not dishonored by the mere "effluxion of time which is provided for in "their own language."*

The counts merely allege that the notes "were due and payable on demand," and it appeared from their dates that there had been an *"effluxion of time"* since they were made. But, as stated by Judge Comstock, there can be no presumption that by reason of that fact the notes were dishonored obligations, or that the makers have neglected and refused to pay the notes.

The payee or holder of a demand note can place the maker in default at any time by demand, *but no one else can.*

Upon the few facts set out, Judge Hough was clearly right in saying that no action for conversion would lie against the "recipient of the discount proceeds," for nowhere is it alleged who the recipient of the discount proceeds was.

Moreover, a conversion can only arise where there is an unlawful taking; or, if the original taking were lawful, an unlawful detention. No unlawful taking is alleged, for it is not stated who received the moneys of the bank on the discount. Where a conversion depends upon an unlawful taking, the bill in conversion would clearly have to charge the defendant with having unlawfully taken the property. If the conversion grew out of an unlawful detention, the original taking having been lawful, facts showing a detention would be required necessarily to be alleged; and there could be no detention until demand.

With most of the general propositions of law

stated in the brief of the Solicitor General, we have no dispute. His argument, however, proceeds upon an entire misconception both of the counts and of the decision of Judge Hough. At page 14 of his brief, he says:

> "This indictment does aver that the pay-
> "ment of the proceeds of the discount TO THE
> "MAKER OF THE NOTE was for the use, benefit
> "and advantage"

of the defendant and other persons unknown.

It is here that his whole argument fails, for there is no statement in the count that the proceeds of the discount went to the makers of the notes. True, the notes "were discounted." True, the makers were as stated. True, the misapplications charged and the discounts mentioned were "for the use, benefit and advantage of the said Fritz Augustus Heinze and other persons to the grand jurors aforesaid unknown." But A can discount at a bank or sell at a reduction the note of B—in such a case the proceeds of the discount would be paid to A; or A, being the president of a bank could, as such, discount the note of B and the proceeds of the discount be paid to B.

The essential fact—to whom the moneys of the bank were paid—the counts do not state.

No collusion is alleged between the makers of the notes and the defendant. It is not the makers of the notes and the defendant, but the defendant "and other persons to the grand jurors aforesaid unknown" for whose use, benefit and advantage the misapplication or discount is charged to have been made. "Other persons unknown" would scarcely suggest the makers of the notes.

It would be beyond the capacity of human ingenuity to either pick out a defendant or frame a bill in conversion upon the meagre facts alleged.

The Court was searching for allegations in the

counts which would show how the application was made, and that it was an unlawful one. It was in no way concerned with construing the statute, for the meaning of the statute was clear, but the allegations of fact meagre and ambiguous. The general phrases of the statute, copied in the counts, to the effect that what was done was with intent to defraud the Bank and was for the benefit of the defendant, and other persons unknown, and that the defendant misapplied the moneys, funds and credits of the Bank, did not aid the counts.

The mere case of a discount of commercial paper was set out. The Court, therefore, dealing with the indictment *solely as a pleading,* was of opinion that it failed to charge any crime under the Statute—the whole opinion *sub silentio* treating the meaning of the Statute as clear and requiring no interpretation.

IF IT BE ASSUMED THAT THE COURT IN ITS DECISION DID CONSTRUE SECTION 5209 OF THE REVISED STATUTES, THE EXTENT OF ITS CONSTRUCTION WAS TO ASSERT THAT TO CONSTITUTE THE OFFENSE OF WILFUL MISAPPLICATION UNDER THE STATUTE THERE MUST BE A CONVERSION TO THE USE OF THE OFFENDER OR OF SOME ONE ELSE OF THE MONEYS OR FUNDS OF THE ASSOCIATION BY THE PARTY CHARGED, AND SUCH A CONSTRUCTION IS UNQUESTIONABLY CORRECT.

This Court in *United States* v. *Britton,* 107 U. S., 665, at page 666, said:

> "We think the willful misapplication made an offense by this statute means a misapplication for the use, benefit or gain of the party charged, or of some Company or person other than the Association. *Therefore to constitute the offense of willful misapplication there must be a conversion to his own use or the use of some one else of moneys and funds of the Association by the parties charged."* (Italics ours.)

This case was decided in 1882. Some four years later, and in 1886, the case of the *United States* v. *Northway* was decided, 120 U. S., 327, and in that case this Court had occasion to refer to the *Britton* case, saying:

> *"And it was held to be of the essence of criminality of the misapplication that there should be a conversion of the funds to the use of the defendant or of some person other than the association with intent to injure and defraud the association or some other body corporate or natural person."* (Page 332.)

In 1893 the Court in deciding the case of *Evans* v. *United States*, 153 U. S., 584, at page 587, said:

> "The Section in question in this case was before this Court in United States *v.* Britton, 107 U. S., 655-669 in which the willful misapplication, made an offense by this statute, was defined to be 'a misapplication for the use, benefit or gain of the party charged or of some company or person other than the association, *and that to constitute such an offense there must be a conversion to the use of the offender or of some one else of the moneys or funds of the association' by the parties charged.*" (Italics ours.)

In 1894, this Court decided the case of *Coffin* v. *United States*, 156 U. S., 432. Mr. Justice White in his opinion at page 449, says:

> "In the Britton case we said that 'the willful misapplication which was made an offense by this statute means a misapplication for the use and benefit or gain of the party charged or of some other person; and therefore to constitute the offense of willful misapplication there must be a conversion to the party's own use or to the use of some one else of moneys and funds of the association.' This essential element of the offense is not averred in the counts under consideration * * * ."

In view of these repeated decisions it must be regarded as settled that to constitute the offense of wilful misapplication there must be a conversion by the party charged to his own use or the use of some one else. Judge Hough, in his decision, speaks of conversion as being, "the one characteristic or essential of this crime on which the Supreme Court has always insisted." In so doing he is merely paraphrasing the language of this Court, which in the *Coffin* case at page 449, referring to "conversion" speaks of it as *"this essential element of the offense."*

That *the facts* alleged must, as stated by this Court, show a conversion, has been clearly recognized in the indictments found under this statute. An examination of the reported cases in the lower Federal Courts will show that the defendant has been in terms charged with "converting" the property referred to.

United States v. *Fish*, 24 Fed. Rep., 585-587 (BENEDICT, *J.*).

United States v. *Harper*, 33 Fed. Rep., 471-473 (JACKSON, *J.*).

United States v. *Youtsey*, 91 Fed., 864-866 (TAFT, *J.*).

Jewett v. *United States*, 100 Fed., 832-837, (PUTNAM, *J.*).

United States v. *Eastman*, 132 Fed., 551-552, (ALDRICH, *J.*).

Geiger v. *United States*, 162 Fed., 844-847, (MCDOWELL, *J.*).

United States v. *Martindale*, 146 Fed., 281-289, (PHILIPS, *J.*).

Fleckinger v. *United States*, 150 Fed., 1, 2 (LURTON, SEVERENS and RICHARDS, *JJ.*, latter delivering opinion).

Dickson v. *United States*, 159 Fed., 801 (ALDRICH, BROWN and PUTNAM, *JJ.*, latter delivering opinion).

It is a familiar rule that the established construction of statutes by officers charged with proceeding under them, is entitled to respect, particularly when that construction finds its support in the repeated decisions of this Court.

In *United States* v. *Carll*, 105 U. S., 611, this Court deemed it proper, in criticising the indictment then before it, to comment upon the fact that it departed from "all approved precedents."

In *Keck* v. *United States*, 172 U. S., 434, at page 437, this Court quoted with approval the following language from *Hess* v. *United States*, 124 U. S., 483, 486:

> "The statute upon which the indictment is founded only describes the general nature of the offense prohibited, and the indictment, in repeating its language, without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to the jury."

Judge Hough, therefore, in stating the facts alleged in the pending indictment, counts 1-15, followed this established rule, clearly passed upon the indictment *as a pleading*, and nothing more.

THE COUNTS IN QUESTION ARE NOT GOOD UNDER THE DECISION OF THIS COURT IN UNITED STATES v. EVANS, 153 U. S., 587.

The Solicitor-General in his brief refers to the *Evans* case in support of the validity of the counts in question, claiming that under it these counts are good. It has been contended earlier in this brief that the question as to whether these counts are inherently good or bad is not before the Court. It may be proper in this connection, however, to point out that the *Evans* case is not an authority for the validity of the counts in question.

This Court in the case of *Dunbar* v. *United*

States, 156 U. S., 185, at page 190, referring to the indictment then before it, said:

> "The pleader is at liberty to use any form of expression, provided only that he thereby fully and accurately describes the offense; *and the entire indictment is to be considered in determining whether the offense is fully stated.*" (Italics ours.)

Counts 1-15 of the indictment do *not* allege, as previously pointed out, that the makers of the notes in question were or are *insolvent.* As was said in *Walrod* v. *Ball,* 9 Barb., 271, at page 276:

> *"Insolvency is never presumed. Ability to pay all his engagements is presumed in favor of every man, just as the law presumes against fraud and guilt."*

See also:

> Court of Appeals State of New York, in *Potter* v. *Merchants Bank,* 28 N. Y., 641, 655.

Under the allegations of the counts, therefore, the presumption would be in law that the makers of the notes in question *were solvent* and could be made to pay, unless the allegation found in counts 1-15 that the notes in question, "when so received and discounted as aforesaid were not then and there well secured, and in fact not secured at all," as the defendant knew, is to be regarded as an allegation of insolvency. In some of the counts the words "not secured at all" are omitted and the phrase is "was not then and there well secured."

If there were in this indictment nothing further than this expression it might be urged that the asertion that the note was not well secured referred both to the absence of collateral and the lack of personal responsibility in the makers. But when count 16 of the indictment is examined, and the pleader who prepared the in-

dictment as a whole, *feels justified in alleging insolvency*, he does not confine himself to this ambiguous and unhappy phrase. He still uses it for whatever benefit it may be, but is careful to add, referring to the maker of the note, *"that he was not able to pay the same, he then and there being wholly insolvent* (R. P., 22). In other words, where the pleader was able to allege insolvency, he did it in clear and unmistakable and even unnecessarily redundant language, and does it in addition to the assertion that the "note was not then and there well secured and in fact not secured at all," and in contradistinction to that averment. Whatever, therefore, may be meant by that phrase, it does not mean, and could not be construed into an allegation of insolvency in the other counts. By the specific assertion of insolvency in count 16, the pleader himself has repudiated these words as meaning or to be construed as an allegation of insolvency in the earlier counts.

If, therefore, there is no allegation of insolvency, and it is the law that solvency is to be presumed, the counts come directly within the opinion of *Mr. Justice Day*, concurred in by *Mr. Justice Lurton* and *Circuit Judge Severens*, in *MacKnight* v. *United States*, 115 Fed. Rep., 972, where the Court says at page 984:

> *"But if the money was given to Britt and Reeder upon their paper which they could be made to pay, it was, it seems to us, a very weighty circumstance.* * * *. Indeed, if Britt and Reeder were responsible financially, it is difficult to perceive how the Bank could be defrauded."*

Later on the opinion adds (page 984):

> *"No fraud upon the Bank could result if it received a good note* * * *."

Under the allegations of the counts in question, giving them their legal effect, the Bank received

upon the discount *"a good note,"* a note which the makers *"could be made to pay."* The count not only therefore fails to state a crime, but is bad for repugnancy, as there could have been no intent to defraud the Bank by the discount of "a good note," the payment of which could be exacted from the makers.

A brief examination of the *Evans* case will show that there a very different question was presented. The indictment as a whole clearly showed the insolvency of Evans, whose own note had been discounted by the Bank. There were many counts dealing with over-drafts, checks drawn on the Bank and paid when he was without funds to his credit, and the substitution of his "worthless notes" for the notes of other parties. There, as here, the Court was considering the indictment as a whole and determining the meaning of its allegations by that standard. The fourteenth count of that indictment, dealing with the question of wilful misapplication by means of "unlawful discounts," contained the allegation that the note when discounted "was not then and there well secured, as the cashier and Evans both well knew, and which note was never paid, by reason of which the Bank suffered loss in this amount." The phrase "was not then and there well secured" was not used in contradistinction to an allegation of insolvency, as it is used in this indictment. It stood by itself, and its meaning was to be determined by reference to the other allegations in the indictment. This Court clearly treated it as an allegation of insolvency. After referring to the fact that the mere discount of an unsecured note would not be a crime this Court added that that would be so only, " if the maker believed that he would be able to provide for it at maturity, yet if his original intent was to procure the note to be discounted in order to defraud the Bank as

charged in this count every element of criminality is present." In other words, the Court considered the count as practically charging that the parties knew they were not able to provide for the note at maturity, that is, were insolvent. Later, at page 596, this Court says:

> "An averment that Evans was at the time insolvent or knew himself to be so was also unnecessary in view of the allegation that Evans knew that the note was not secured and procured the same to be discounted with intent to defraud the Bank."

This clearly indicates that the assertion that the note was not secured was regarded by the Court as equivalent to an allegation of insolvency. Moreover, it was Evans' *own note* that was discounted. He knew his *own* responsibility and the allegation that his *own* note was not well secured to his *own* knowledge was treated as an allegation that it was worthless and he knew it to be so. If the indictment in the Evans case be examined the many allegations to be found dealing with the worthless character of the Evans obligations will clearly show that this Court was justified in treating the allegation that the note was not well secured, in view of the indictment as a whole as an allegation of insolvency. Particularly is this true when it is remembered that the case came before this Court after conviction and verdict of guilty.

In passing it may be proper to call attention to the fact that there was a distinct allegation in the *Evans* case that the note in question *was never paid, and by reason of that fact the Bank suffered loss.* Here, however, there is no allegation that the note has not been paid. Again, in the *Evans* case the note was overdue and the maker in default, as appeared by the record. Here, however, there is nothing in the record to show that the notes in question are due, or that the makers are in default.

The *Evans* case, moreover, is not an authority for the proposition that where the facts alleged to constitute the wilful misapplication charged, fail to show the commission of any crime, general allegations of criminality in the language of the statute, will make the count good.

This Court has had frequent occasion to state that such words as "fraud," "conspiracy," "with intent to defraud," "corruptly" and words of similar import, cannot be used as predicating criminality of facts which in themselves show no criminality.

Ambler v. *Choteau*, 107 U. S., 586.
United States v. *Des Moines Co.*, 142 U. S., 544.
Batchelor v. *United States*, 156 U. S., 426.

The latter case was one dealing with this very crime of wilful misapplication and this Court said at page 429:

> *"The general allegation, at the beginning of the count in question (referring to the general allegations that what was done was wrongfully and fraudulently done and done with intent to defraud the Bank), is rightly admitted to be insufficient, unless the acts afterwards alleged amount to a wilful misapplication of the funds of the association within the meaning of the statute."*

The general rule is well expressed by *Judge Benedict* in *United States* v. *Eno*, 56 Fed. Rep., 218, 220, where he says, referring to Section 5209:

> *"The rule on this subject has been stated as follows: The words 'with intent to injure and defraud' are words essential to the offense as charged, but do not enlarge the significance of the language which avers the facts necessary to be proved in order to constitute the offense (Mass. Crim. Law, 624)."*

In the *Evans* case, Evans caused his *own* note to be discounted, knowing himself to be insolvent and his note to be worthless, and it was charged that he did this with intent to defraud the Bank. In this connection the language of Mr. Justice Day in *MacKnight* v. *United States,* 115 Fed. Rep., 974, is very pertinent:

> *"How is this intent to be proven? In view of the fact that intent or purpose is involved in a mental process which can be only known to the actor, the law requires only such proof as the nature of the thing to be proved admits, and it has long been the practice to instruct juries in such trials that the intent may be proven by the act done and that one may be presumed to have intended the natural and probable consequences of acts intentionally done."*

The natural and probable consequences of the discount by a bank officer of his *own worthless note* would be a fraud upon the bank. Therefore, from the act standing by itself a fraudulent intent could be inferred by the jury, and the requirement of the statute is met.

Where, however, as in this case, under the allegations of the counts, the natural and probable consequences of the discounting of notes with responsible makers, would result in no fraud upon the Bank—any criminal intent would have to be proved *aliundi,* the facts alleged. Here, where the facts charged show no crime, if a general allegation of fraudulent intent be held sufficient, the *crucial facts* upon which the defendant is sought to be convicted, namely, the facts showing intent, he would in no way be informed of. He would be absolutely unable to meet them. To prepare his defense would be impossible.

It will not do to say that by indicating the transaction in which it is alleged the misapplication occurred, the defendant is sufficiently notified of

the facts to be urged against him. For this is to override the presumption of innocence and assume his guilt.

It is submitted, therefore, that the *Evans* case is in no way an authority for the counts in question.

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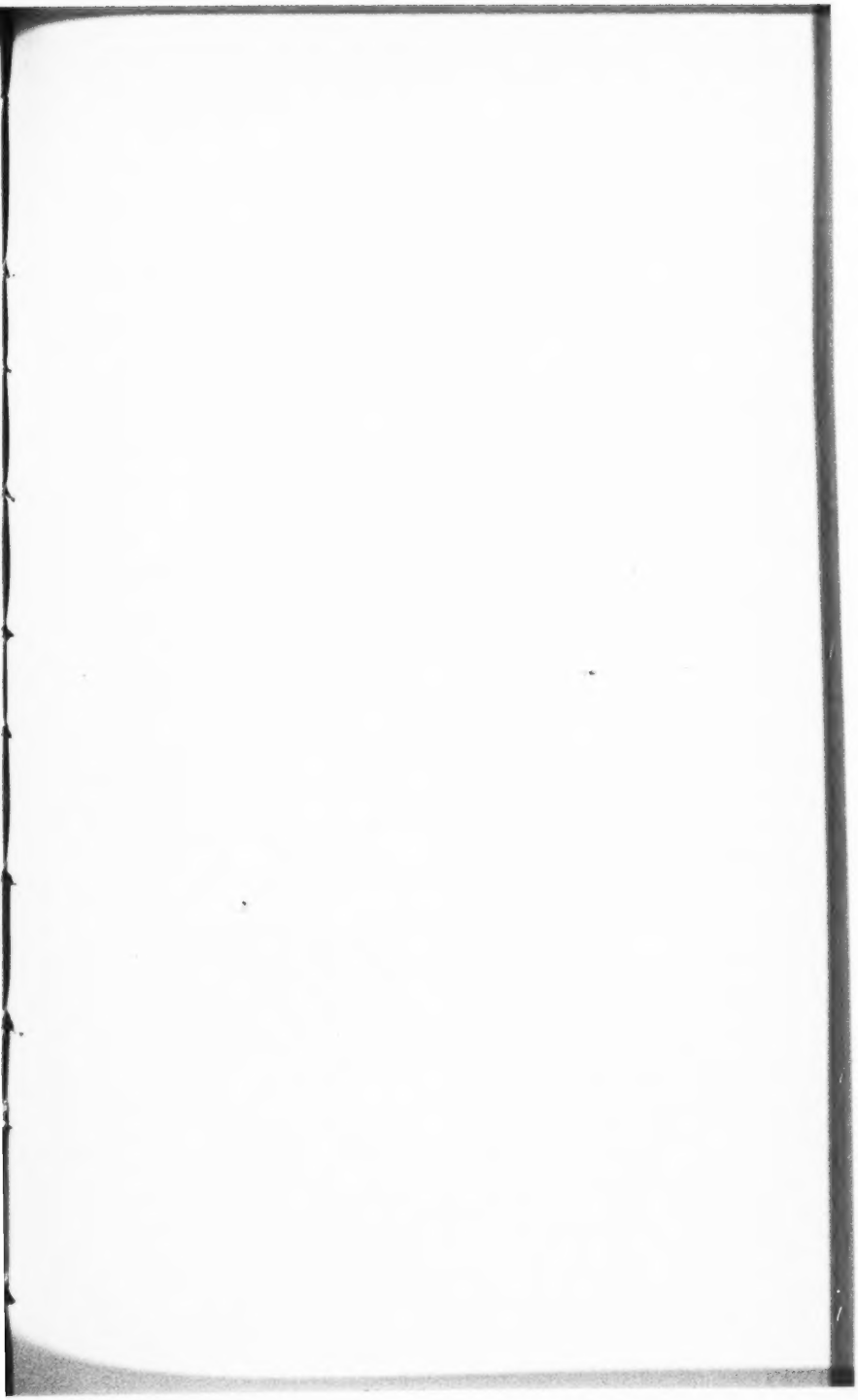

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 671.

THE UNITED STATES,
Plaintiff-in-Error,

vs.

FRITZ AUGUSTUS HEINZE,
Defendant-in-Error.

In Error to the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR DEFENDANT-IN-ERROR.

Statement.

This is a writ of error sued out by the United States to review the action of the Circuit Court quashing certain counts in an indictment found against the defendant-in-error, under Section 5209, U. S. Revised Statutes. The writ is issued under the Act of March 2, 1907, and under that clause thereof which reads:

> "From a decision or judgment quashing, "setting aside, or sustaining a demurrer to

> "any indictment, or any count thereof, where "such decision or judgment is based upon "the invalidity, or construction of the "statute upon which the indictment is "founded" (C. 2564, 34 Stats., 1246).

The entire indictment appears in the record (pp. 2-22). It consists of seven *numbered* counts and seven *lettered* counts. The decision of the Court below sufficiently describes them, and as it is that decision which is here for review, for convenience, we here insert it in full (R., 25):

> "The Court (Hough, *J.*, orally). Refer- "ring now only to the indictment of 1910, "it appears to me that the present motion, "which is, of course, to dismiss, renders it "necessary to consider the matter somewhat "more widely than would be proper upon "demurrer only. That is to say, I believe "by the weight of authorities a motion to "quash is addressed largely to the discretion "of the Court, and if for any lawful reason it "appears to be unjust, or not to the public "benefit that the defendant should be put to "his trial upon one or more counts, or upon "the whole indictment, it is the duty of the "Court, of course, to quash the same.
>
> "Now, I will first very briefly express my "views, and I hope I do it with becoming "modesty, regarding the numbered counts "of the indictment; that is, the numbered as "distinct from the numbered and lettered "counts of the most recent presentment. "Now, undoubtedly, as I have held several "times, and as has been held by many other "inferior Courts, the Evans case is ample "authority for asserting that an allegation of intent is an allegation of fact, and that "when duly made it will help out other al- "legations of fact, which, standing by them- "selves, would be insufficient. But on the "demurrer which was presented last year to "the indictment of 1909, that argument was "by the prosecuting officer pressed to its "utmost, and it was then admitted and as-

"serted by the gentleman representing the "Government that if an indictment or a "count in an indictment presented for the "consideration of the Court and the jury, a "perfectly honest or a perfectly indifferent "state of facts regarding any banking trans- "action, such as a loan or a discount or an "overdraft, that it was enough to put the "defendant to his trial to add to the state- "ment of those indifferent facts out of which, "standing by themselves, no criminality "could be spelled, an allegation of intent to "defraud. I do not deny that literally con- "strued some of the language of the Supreme "Court in the Evans case may be said to be "capable of that result; but it seems to me "so unjust, so dangerous to the citizen, that "it ought not to be followed, or the argument "ought not to meet with approval until "doubt or denial is no longer possible, and I "therefore upheld the motion to quash de- "murrer to most of the counts in the indict- "ment of 1909.

"Now, what is the difference between the "numbered counts in the indictment of 1910 "and the first fifteen counts of the indictment "of 1909? From an examination of them "which I recently made it appears, or would "appear to me, that in six out of the seven "numbered counts in the indictment of 1910 "there is exactly the same story as was con- "tained in the corresponding number of "counts in the indictment of 1909, with this "difference: That the transaction which was "said to have been evidenced by a demand "note of 1909 is called in 1910 a demand "loan, and it is then asserted, after stating "the same facts in substance as those set "forth in 1909, that there was a conversion.

"Now, it may be that under the language "of Judge Putnam in the case cited in the "First Circuit Court that if, speaking very "loosely, the counts in the indictment had "stopped there it might be good on de- "murrer. But I have not heard it doubted "or denied that if an indictment or any other "pleading goes beyond general words and

"alleges that which is special, that the spe-
"cial words will control the general, so that,
"taking the whole story as told in the num-
"bered counts of the 1910 indictment, I am
"unable to see that it differs from the cor-
"responding statements of 1909, except
"that they have a label put on them and
"they are called 'conversion.' Now, there
"isn't any magic that I know of in that word,
"for, as matter of fact, the allegations set
"forth specially do not even *prima facie*
"amount to a conversion; calling them a
"conversion will not help the matter.

"I put it to myself this way: Suppose that
"the Government proves exactly what is set
"forth in the numbered counts of the 1910
"indictment, without anything else—not an-
"other word except the circumstances that
"are detailed in those counts—would it be
"lawful and, what is quite as important,
"would it be fair, would it be intellectually
"honest to permit from those facts and
"nothing more a petit jury to imply or infer,
"first, a conversion, and second, an intent to
"defraud? It seems to me that the answer
"to both of those enquiries is emphatically
"no.

"Now, construing these numbered counts
"of the 1910 indictment with the greater lati-
"tude which I believe that I am entitled to
"assume or exercise, since there is a motion
"to quash before the court, I don't think any
"lawyer of experience can read and compare
"these counts under the 1910 indictment, say
"1 and 1A, for instance, without being com-
"pelled to believe that 1A specifically sets
"forth the prosecution's case, and that num-
"ber 1 sets forth a very general form of words
"under which it is hoped that other proof
"may be admitted to help out the allegations
"of the indictment, if the exact case made by
"1A fails. Now, in my judgment, it is not
"wise, it is not for the advantage of the ad-
"ministration of criminal law, that evidence
"should be speculated with in that manner;
"therefore, upon both grounds, because in my

"humble opinion, subject to instructions "which I have previously said I hoped the "lower courts will get on this subject of the "national banking act from the highest tri- "bunal, I believe that the numbered counts "in the indictment of 1910 are demurrable, "and second, because it is my judgment that "it is not advisable to permit both the num- "bered and the lettered counts to go before "the same jury, as matter of discretion I "quash the counts of the 1910 indictment "numbered from 1 to 7, inclusive.

"Now, the lettered counts confessedly set "forth the same transactions, as far as a "note or a loan is concerned, as are told in "the numbered counts, but those counts also "show at great length and, in my judgment, "with perfect clearness, the existence and "pre-existence to the knowledge of the de- "fendant of a speculative venture of the most "hazardous nature, because the lettered "count definitely asserts that the loan was "made to persons who were interested with "the defendant in that venture. Now, I have "already tried to make to counsel, some of "whom are here present, as plain as possible "my own views as to the nature of the loan- "ing of trust funds to an insolvent, and I "have said and do believe that if such unse- "cured loans of trust funds be made to an "insolvent voluntarily, that that is *prima* "*facie* a case of conversion, and I do not "think that the Britton case sustains any op- "posite view, and if that conversion, if it be "one, and is proven to be done with intent to "defraud, it amounts to a crime.

"Now, just as there is no magic in the "word 'conversion,' there isn't any magic in "my opinion in the word 'insolvent,' and any "party handling trust funds who voluntarily "parts with those trust moneys to a hazard- "ous and an immoral enterprise for the bene- "fit only of others than the bank and to the "loss of the bank, is also, in my judgment, "*prima facie* guilty of conversion, and if that "also be done with the intent to defraud and

"as denounced by the statutes, the jury may "find it to be a crime. Therefore, I deny the "motion to quash or otherwise dispose of "now the lettered counts of the 1910 indict- "ment."

ARGUMENT.

The points to be made for the defendant-in-error are:

1. The trial Court dismissed counts numbered 1-7 in the exercise of its discretion. Its action is, therefore, not reviewable here under the Act of March 2, 1907.

2. The Act of March 2, 1907, as it is explained in U. S. *v.* Keitel, 211 U. S., 370, gives this Court authority to review the decision below, only provided that decision was based upon the construction of a Statute.

3. The decision of the Court below did not involve a discussion of Section 5209 of United States Revised Statutes.

4. If the decision of the Court below be regarded as construing Section 5209 of the Revised Statutes, and as basing its decision upon such construction, the construction given the Statute was the correct one.

5. The insertion in the counts of the words "converting" and "converted" did not strengthen them.

6. The Act of March 2, 1907, is not applicable to this case (Brief in No. 380, pp. 12-20).

I.

The trial Court dismissed counts numbered 1-7 in the exercise of its discretion. Its action is therefore not reviewable here under the act of March 2nd, 1907.

The case had been called for trial upon the indictment and plea of not guilty when the motion to quash the counts referred to was made. The numbered and lettered counts, in so far as they charge the facts claimed to constitute the alleged crime of willful misapplication, were the same. The difference between them consisted merely in the fact that the lettered counts with great elaboration set out the scheme and purpose which it is claimed prompted the loans in question. The Court was of opinion that it would be unfair to the defendant to permit his going to trial upon all the counts; and, therefore, in the exercise of that discretion, which it has always been recognized a trial Judge possesses, in the interests of justice, and should in a proper case exercise, it dismissed the numbered counts. Whether it was right in so doing, or whether the exercise of its discretion was a wise exercise, are questions entirely immaterial to this discussion.

That the Court dismissed the counts *entirely as a matter of discretion* is clear both from its opinion and its order.

Its order or judgment reads as follows (R., p. 28):

> *"The Court in the exercise of its discretion, having duly rendered an opinion in open Court, and having for the reasons stated in the said opinion sustained the motion to*

> *quash counts numbered respectively, 1, 2, 3, 4, 5, 6 and 7 of said indictment,"*

ordered that the same be quashed.

The Court, in its opinion expressed itself as follows (R., p. 27):

> "And second, because it is my judgment that it is not advisable to permit both the numbered and the lettered counts to go before the same jury, *as a matter of discretion, I quash the counts of the 1910 indictment numbered from 1 to 7, inclusive."* (Italics ours.)

It appearing, therefore, so clearly as to admit of no discussion, that the counts were quashed as a result of the exercise of the Court's *discretion*, its act in this regard is not open to review here.

II.

The Act of March 2nd, 1907, as it is explained in U. S. v. Keitel, 211 U. S., 370, gives this Court authority to review the decision below, only provided that decision was based upon the construction of a statute.

The discussion of this proposition has been elaborated in the brief submitted in the case of *United States* v. *F. Augustus Heinze*, No. 380 of the present term, argued herewith. It is, therefore, not necessary to repeat that argument here.

III.

The decision of the Court below did not involve a discussion of Section 5209 of United States Revised Statutes.

The Court merely dealt with the sufficiency of the counts in the indictments as a pleading under that statute. The argument made in case No. 380 of this term is respectfully referred to here as the reasons there given for the contention then made apply with equal force, *mutatis mutandis*, to this proposition.

IV.

If the decision of the Court below be regarded as construing Section 5209 of the Revised Statutes, and as basing its decision upon such construction, the construction given the statute was the correct one.

It is not deemed necessary to argue this proposition, as practically the same question has been discussed in the brief in case No. 380 of the present term, and reference is made to the argument there presented.

V.

The insertion in the counts of the words "converting" and "converted" did not strengthen them.

Had the pleader stopped when he had alleged that the misapplication was made by converting the moneys, funds and credits of the bank to the use of the persons named, there is authority in the lower Courts in one case (*Jewett* v. *U. S.*, 100 Fed. Rep., 834) for the contention that the crime of misapplication was sufficiently charged, upon the theory that the allegation, that the defendant did convert to his own use, shows how the misapplication was made and that it was an unlawful one. The pleader in the accounts mentioned, however, added that

> *"The said conversion and application * * * was then and there accomplished"*

by the defendant *"in the manner following,"* and proceeds to set out the facts, which by his characterization, constitute the "conversion." The facts, however, affirmatively show that there was no misapplication and no conversion of the moneys of the bank. The facts are repugnant to the allegation of "conversion." The count is analogous to a count which charged a defendant with stealing property. If such a count should merely charge the defendant with stealing property, describing it, the count might be good, but if it charged the defendant with stealing certain property and then alleged that he stole it "in the manner following," and proceeded to describe what it called stealing by saying that some one had loaned the defendant property which he had promised to return, but had failed to, no demand having been made, the count would be clearly bad.

This Court has had occasion to consider indictments in which the words "converting" and "converted" were used in connection with allegations of fact claimed to show misapplication. The use of these words did not save the counts.

In *U. S.* v. *Britton*, 108 U. S., 192, and in *Batchelor* v. *U. S.*, 156 U. S., 426, this Court on demurrer to the indictments held that the facts set out did not show the crime of wilful misapplication charged in the indictments.

The first count in the *Britton* case which the Court held did "not charge an offense under Section 5209 of the Revised Statutes" (p. 197) contained *inter alia* the allegation that

> "The defendant *converted* to his own use the proceeds of the discount of said note, to wit, the sum of $20,251.63" (p. 194). (Italics ours.)

In the *Batchelor* case the count there involved and held to be invalid contained *inter alia* this allegation, referring to the act of the defendant Harry F. Batchelor:

> "All of which sums were misapplied wilfully and in the manner aforesaid out of the moneys, funds and credits of said association and *converted* then and there to the use, benefit and advantage of said Harry F. Batchelor" (p. 424). (Italics ours.)

The Court below in its opinion correctly stated the law when it said (R., p. 26):

> "But I have never heard it doubted or denied that if an indictment or any pleading goes beyond general words and alleges that which is special, that the special words will control the general."

The demurrer, while admitting the facts set out in the counts, did not admit the conclusions which the pleader saw fit to draw from his facts.

U. S. v. *Des Moines Company*, 142 U. S., 544.

The language of *Mr. Justice Brewer* in the case cited is peculiarly pertinent to the proposition under discussion. He said:

> "But such a general averment, though repeated once or twice, is to be taken as qualified and limited by the specific facts set forth to show wherein the transaction * * * was fraudulent."

It would seem to admit of no discussion, as pointed out by the Court below in its decision, that the *label* which the pleader places upon his facts in no way adds to their force or legal effect.

If, as is confidently asserted, the insertion of the words "converting" and "converted" in the counts in question do not add to their validity, further discussion of the immediate proposition before the Court is unnecessary, as in the brief filed in the case No. 380 the argument to the effect that the allegations of fact in the counts in question are not sufficient to charge the crime of wilful misapplication, is applicable here. All that was there said, *mutatis mutandis*, applies with equal force to the counts in question.

In conclusion, it need only be said that if this Court should hold that the Court below in rendering its decision construed Section 5209 of the Revised Statutes, and that its construction was incorrect, nevertheless it is without power to reverse the judgment for errors assigned *as the decision of the Court was based upon the exercise of its discretion.* That incorrect views of the law may have entered into the mind of the Court in exercising its discretion is of no moment.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

Nos. 380 and 671.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FRITZ AUGUSTUS HEINZE.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FRITZ AUGUSTUS HEINZE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

On our main brief (No. 380) we discuss (pp. 12-20) the proposition that the act of March 2, 1907, giving the United States ONLY a writ of error to this court in criminal cases where involving the *construction* of a Federal statute, is

pro tanto invalid because denying like review in this court to the defendant.

Replying thereto, the supplemental brief submitted for the United States contends (pp. 7-14) that the act in question does not deprive an accused of his life, liberty, and property without due process of law, because the specific guaranties of the Constitution still remain. Counsel adds (p. 8):

> "The right of the United States to have this court
> " determine the question whether a court below has
> " properly construed a statute upon which an indict-
> " ment is based is only *granting to the United States*
> " *a new process* by which it can challenge the de-
> " cision of a lower court, purely upon a question of
> " law, and does not deprive the accused of anything
> " *previously* possessed by him or guaranteed by the
> " Constitution."

But that is precisely our complaint. A *new* remedy is sought to be accorded to the United States—the great privilege of review in *this* court—which is *denied* to the defendant. That is plain discrimination, and violative of all fundamental rights. Due process of law and equal protection of the laws are but terms of expression declaratory of those fundamental rights. In *Holden vs. Hardy*, 169 U. S., 366, 391, the court quotes with approval the strong language of Mr. Justice Miller, in *Davidson vs. New Orleans*, 96 U. S., 97, that,

> "Recognizing the difficulty in defining, with exact-
> " ness, the phrase due process of law, it is certain
> " that these words *imply a conformity with natural*
> " *and inherent principles of justice.*" * * *
> (Brief, 380, pp. 16-17).

Certainly "natural and inherent principles of justice" forbid that even the United States, as public prosecutor, may bring the question of *construction* of the Federal statute to this court and *deny* like opportunity to the defendant, thus leaving him to be heard on appeal in some other and lower Federal tribunal. Plainly the defendant may suffer adverse decision and resulting imprisonment in *his* case on *that* court's construction of the statute when in some other and later case brought to this court of last resort this court may construe the statute in a wholly different way. Uniformity of decision, which is the professed purpose of the act of 1907, can be better attained by *uniform* right of review in this court accorded both plaintiff and defendant alike as the exigency may arise.

II.

The *Sinking Fund cases,* cited on our brief in No. 380, have certain application here. There the court held the United States bound by its contracts while expressly saying "They are *not* included within the constitutional pro-"hibition, which prevents States from passing laws impair-"ing the obligations of contracts." Manifestly the court here applied those "natural and inherent principles of jus-"tice" to which Mr. Justice Miller refers. When the United States is thus held bound thereby in respect of its *contracts* it is certain it is equally bound to like treatment of life and liberty. No remedy by appeal can, in such view, be accorded the Government which is not accorded the accused.

The suggestion that *hitherto* the United States has not enjoyed any right of appeal, and hence on our contention the privilege in that regard accorded the accused was uncon-

stitutional, is unsound. The United States may by legislation, secure full privilege of review. *But it cannot, in justice, take it in this court upon any question and at the same time debar the defendant from like opportunity here* when the trial court has decided against him on its *construction* of the statute.

Our contention hence is that unless the defendant may come to this court invoking its construction of the statute on final judgment the *unilateral* right sought by this statute to be accorded the United States is an unconstitutional exercise of legislative power and hence void.

It needs only the suggestion that the *right* to writ of error sought to be given the United States, and the remedy by petition for certiorari, which the defendant may invoke, do not stand on equal plane.

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